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EDITOR'S NOTE

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No. 86-566-ASX
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Title: Barclay Perry and James Johnston, Appellants
v.
Kenneth Morgan Thomas

Docketed:
October 7, 1986

Court: Court of Appeal of California,
Second Appellate District

Counsel for appellant: Dolan, Peter Brown

Counsel for appellee: Gelber, Bruce

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1986	G	Statement as to jurisdiction filed.
2	Nov 3 1986	X	Motion of appellee Kenneth Morgan Thomas to dismiss or affirm filed.
3	Nov 5 1986		DISTRIBUTED. November 26, 1986
4	Nov 14 1986	X	Reply brief of appellee Kenneth Thomas filed.
5	Dec 1 1986		PROBABLE JURISDICTION NOTED.
			**********
6	Jan 20 1987		Brief of appellants Barclay Perry, et al. filed.
7	Jan 20 1987		Joint appendix filed.
8	Feb 10 1987		Record filed.
9	Feb 18 1987		Brief of appellee Kenneth Morgan Thomas filed.
10	Mar 13 1987		CIRCULATED.
11	Mar 11 1987		SET FOR ARGUMENT. Tuesday, April 28, 1987. (2nd case).
12	Apr 20 1987	X	Reply brief of appellants Barclay Perry, et al. filed.
13	Apr 28 1987		ARGUED.

JURISDICTIONAL

STATEMENT

86-566

Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,
Appellants,

v.

KENNETH MORGAN THOMAS,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Section 2 of the United States Arbitration Act ("Arbitration Act"), ch. 392, 61 Stat. 670, 9 U.S.C. § 2, mandates the enforcement of arbitration agreements, and withdraws from the states the power to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration. *Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). Further, where arbitrable claims are intertwined with non-arbitrable claims, state courts are required to order the arbitrable claims to arbitration. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. ____, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). California Labor Code section 229 provides, in relevant part, that "actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973), held that the Securities Exchange Act of 1934, U.S.C. §§ 78a-78lll (" '34 Act"), as then in effect, did not preempt California's Labor Code section 229.

The questions therefore presented are:

(1) Whether California Labor Code section 229 is preempted by section 2 of the Arbitration Act, thereby precluding an employee from bringing an action in the Superior Court of the State of California to collect wages, if his wage claim is otherwise referrable to arbitration under an agreement between the parties;

(2) Whether California Labor Code section 229 is preempted by the '34 Act as currently enacted;

(3) Whether claims for conversion, civil conspiracy, and breach of fiduciary duty arising from a

denial of wages are arbitrable if joined with a claim for wages, where those non-wage claims are otherwise referrable to arbitration under an agreement between the parties.

PARTIES AND AFFILIATED CORPORATIONS

The parties to this proceeding and their affiliated corporations are the following:

Kenneth Morgan Thomas;

Barclay Perry;

James Johnston; and

Kidder, Peabody & Co., Incorporated, is a wholly-owned subsidiary of Kidder, Peabody Group, Inc. General Electric Financial Services, Inc. owns eighty percent of the stock of Kidder, Peabody Group, Inc., and is a wholly-owned subsidiary of General Electric Company.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,
Appellants,

v.

KENNETH MORGAN THOMAS,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

JURISDICTIONAL STATEMENT

Appellants Barclay Perry and James Johnston appeal from the decision of the Court of Appeal of the State of California dated April 10, 1986. Relying on this Court's opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973), the California Court of Appeal held that California Labor Code section 229 precludes arbitration of claims for wages, and related tort claims arising from an alleged failure to pay wages, despite the fact that (1) the statutory provisions relied on by the Court in *Ware* were subsequently amended, and (2) under the Arbitration Act, 9 U.S.C. § 2, and this Court's opinions in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. ____, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985), said

claims are referable to arbitration. This Jurisdictional Statement is submitted to show both that this Court has jurisdiction of the appeal, and that a substantial question is presented by the appeal.

OPINIONS BELOW

The Statement of Decision of the Superior Court of the State of California for the County of Los Angeles ("Superior Court"), dated April 23, 1985, denying appellants' Petition to Compel Arbitration and Motion for Stay of Proceedings, is not reported and is reprinted in the Appendix at 7a.

The Order of the Court of Appeal of the State of California, Second Appellate District, Division Five ("Court of Appeal"), dated April 10, 1986, affirming the Statement of Decision of the Superior Court, is not reported and is reprinted in the Appendix at 3a.

The Order of the Court of Appeal, dated May 6, 1986, denying appellants' Petition for Rehearing, is not reported and is reprinted in the Appendix at 2a.

The Order of the Supreme Court of the State of California ("Supreme Court of California") denying review after judgment by the Court of Appeal, dated July 10, 1986, is not reported and is reprinted in the Appendix at 1a.

JURISDICTION

The Opinion of the Court of Appeal affirming the Statement of Decision of the Superior Court was dated April 10, 1986. The Order of the Court of Appeal denying appellants' Petition for Rehearing was dated May 6, 1986. The Order of the Supreme Court of California, the highest court from which an appeal may be taken, denying review

of the April 10, 1986 decision of the Court of Appeal, was dated July 10, 1986.

The Notice of Appeal to this Court was timely filed in the Court of Appeal on September 15, 1986 and is reprinted in the Appendix at 9a. This Appeal is being docketed in this Court within ninety days from the Order of the Supreme Court of California, denying review after judgment by the Court of Appeal. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 44 S. Ct. 11, 12, 68 L. Ed. 140, 143 (1923).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). *See also Southland Corp. v. Keating*, 465 U.S. at 6-7, 104 S. Ct. at 856-57, 79 L. Ed. 2d at 9-10.

STATUTORY PROVISIONS AND RULES

United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 2):

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 3):

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending,

upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

California Labor Code § 229:

"Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement."

New York Stock Exchange, Inc. Rule 347:

"Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

Securities Exchange Act of 1934, Section 19(c), ch. 404, 48 Stat. 898 (1934) (codified as amended at 15 U.S.C. § 78s(c) (1975)):

"(c) The Commission, by rule, may abrogate, add to, and delete from . . . the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to re-

quirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter. . . ."

HOW THE FEDERAL QUESTIONS WERE RAISED

At the earliest stage of the proceedings, appellants advanced their position that (1) California Labor Code section 229 is preempted by the Arbitration Act, 9 U.S.C. §§ 1-14; and (2) amendments to the statutory provisions relied on by the Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973), render the decision a nullity; and (3) arbitrable tort claims arising from a denial of wages must be severed from any non-arbitrable wage claim and ordered to arbitration under the authority of *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. ____, 105 S. Ct. 1238, 84 L. Ed. 2d 158. As the Court of Appeal recognized in its opinion:

"The trial court denied appellants' motion to compel, following *Merrill Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117. The trial court found Thomas's suit to be 'fundamentally an action to recover commissions.' Under *Ware,* an action to collect wages may be pursued despite a private arbitration agreement, in accordance with California Labor Code section 229." [Footnote omitted.]

Appellants' arguments were reiterated in the Court of Appeal, which rejected the arguments, finding that:

"If section 229 were preempted by the Arbitration Act, the court could have and presumably would have said so in *Ware* . . . .

. . .

> . . . We do not agree with appellants' suggestion that Thomas's wage claim is severable from his tort claims, and that the latter are arbitrable under *Dean Witter Reynolds Inc. v. Byrd* (1985) ___ U.S. ___, 105 S. Ct. 1238.
>
> The judgment is affirmed."

Likewise, in their Petition for Review of the Decision of the Court of Appeal, the issues presented for review were (1) the effect of *Ware;* (2) whether California Labor Code section 229 had been preempted by section 2 of the Arbitration Act, 9 U.S.C. § 2; and (3) whether tort claims for conversion, civil conspiracy, and breach of fiduciary duty, arising from a denial of wages, are arbitrable. A copy of appellants' Petition for Review of the Decision of the Court of Appeal is reprinted in the Appendix at 12a. The Supreme Court of California declined to review the issues.

STATEMENT OF THE CASE

Appellee, Kenneth Morgan Thomas, is a former employee of Kidder, Peabody & Co. Incorporated ("Kidder, Peabody"), a broker/dealer of securities. Appellants are also employees of Kidder, Peabody. On or about August 23, 1982, in connection with his application for employment by Kidder, Peabody, appellee executed a Uniform Application for Securities Industry Registration on Form U-4 ("Form U-4") which is reprinted in the Appendix at 30a. Form U-4 provides, at paragraph 5, that:

> "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . ."

Among the organizations with which respondent registered was the New York Stock Exchange, Inc. ("N.Y.S.E."). Rule 347 of the N.Y.S.E. provides that "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedures prescribed elsewhere in these rules."

In May 1984, a dispute arose between appellee and appellants concerning certain commissions allegedly owed to appellee by Kidder, Peabody. On January 4, 1985, appellee filed a Complaint in the Superior Court against Kidder, Peabody and appellants. The Complaint is reprinted in the Appendix at 35a. The Complaint seeks $40,000.00 for breach of contract to pay commissions and $150,000.00 in actual damages for conversion, civil conspiracy, and breach of fiduciary duties. The Complaint also prays for exemplary and punitive damages.

In response to appellee's Complaint, appellants demanded arbitration of appellee's claims against them. Appellee refused to submit the dispute to arbitration, and accordingly, appellants filed a Motion for Order Staying Proceedings ("Motion") and Petition for Order Compelling Arbitration ("Petition") in the Superior Court. The Motion and Petition are reprinted in the Appendix at 48a. The Motion and Petition were based on the ground that appellee had entered into a written agreement to arbitrate the controversies asserted in the Complaint. Appellee's claims against Kidder, Peabody were not addressed by

the Petition as Kidder, Peabody did not join in the Petition.[1]

Appellee opposed the Motion and Petition, arguing that his claims were for wages and therefore exempt from arbitration under California Labor Code section 229. Appellee argued that this Court so held in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348.

A hearing on appellant's Motion and Petition was held on April 5, 1985. After hearing argument by counsel for the parties, the Superior Court, on April 23, 1985, filed its Statement of Decision which provides, in relevant part, as follows:

> "The within action is fundamentally an action to recover commissions allegedly earned as an employee of defendant. Counsel stipulated,[2] and this Court so finds, that 'commissions' as used in this case are 'wages' as used in Labor Code Section 229. The ancillary causes of action for conversion, civil conspiracy and breach of fiduciary duty do not change this action into something other than one by an employee seeking different remedies for alleged wrongful withholding of commissions. The alleged claims over and above the commissions sought arise, if at all, from defendants' actions in withholding the commissions and thus may properly be asserted along with the basis action for commissions.
>
> *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware,* 414 U.S. 117, controlling authority here, holds that in accordance with California Labor Code Section 229, actions to collect wages may be pursued without regard to private arbitration agreements. Accordingly, the within petition to compel arbitration and companion motion to stay proceedings in accordance with the private arbitration agreement between plaintiff and defendant are denied." (Footnote omitted.)

Appellants appealed to the Court of Appeal, on the grounds that the Arbitration Act preempted California Labor Code section 229, and, therefore, the arbitration agreement was enforceable; and that the claims for conversion, civil conspiracy and breach of fiduciary duty should be submitted to arbitration, even if the wage claims were non-arbitrable, citing *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. ____, 105 S. Ct. 1238, 84 L. Ed. 2d 158.

On April 10, 1986, the Court of Appeal affirmed the trial court's decision. The Court of Appeal stated that appellee's action against appellants was an action for wages. Further, the Court of Appeal held that this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348, controlled, and that because appellee's wage claim was not severable from his tort claims, his tort claims need not be submitted to arbitration under *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. ____, 105 S. Ct. 1238, 84 L. Ed. 2d 158.

Appellants filed a Petition for Rehearing in the Court of Appeal, which was denied May 6, 1986, without opinion.

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[1]Kidder, Peabody instead filed a separate Petition to Compel Arbitration in the United States District Court for the Central District of California, based on the Arbitration Act and the diversity of citizenship between it and appellee. That Petition was denied by the District Court, and the issue is the subject of an appeal pending in the United States Court of Appeals for the Ninth Circuit entitled *Kidder, Peabody & Co. Incorporated v. Kenneth Morgan Thomas,* Docket No. 85-5935.

[2]Counsel for appellants stipulated that "commissions" are included in the definition of "wages" set forth in California Labor Code section 200.

Appellants filed a Petition for Review in the Supreme Court of the State of California. That court declined to review the judgment by the Court of Appeal, by Order dated July 10, 1986.

THE QUESTIONS ARE SUBSTANTIAL

The issues presented by this appeal are fundamental to the effectuation of Congress' intent in enacting the Arbitration Act. That Act is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983). California Labor Code section 229 is precisely the sort of state protectionist legislation which the Arbitration Act was expressly designed to abrogate. If the decision of the California Court of Appeal is allowed to stand, the clear congressional purpose of the Arbitration Act — the upholding of private contracts to arbitrate as a means of facilitating interstate commerce — will be frustrated. This is particularly true under the facts of this case, where the agreement to arbitrate has been expressly approved by the Securities and Exchange Commission ("S.E.C."), in its role as overseer of the national securities exchanges.

In *Moses H. Cone Memorial Hospital,* this Court held that:

> "Section 2 is the primary substantive provision of the Act. . . . Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.* The effect of the section is to create a body of federal substantive law of arbitrability, applicable to *any arbitration agreement* within the coverage of the Act."

460 U.S. at 24, 103 S. Ct. at 941, 74 L. Ed. 2d at 785 (emphasis added).

The Court also stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." *Id.* at 24-25, 103 S. Ct. at 941, 74 L. Ed. 2d at 785.

The Court reiterated this statement of law in *Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1. There appellant argued that a provision of the California Franchise Investment Law, California Corporations Code section 31512, prohibited arbitration of disputes between a franchisee and a franchisor. In finding that the dispute was arbitrable, *despite* California's prohibition against arbitration of such disputes, this Court reasoned:

> "If we accepted this analysis [upholding the California Franchise Investment Law], states could wholly eviscerate Congressional intent to place arbitration agreements 'upon the same footing as other contracts' . . . simply by passing statutes such as the Franchise Investment Law. *We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared [Congessional] policy requiring enforcement of arbitration agreements."*

Id. at 17 n.11, 104 S. Ct. at 861 n.11, 79 L. Ed. 2d at 16 n.11 (emphasis added) (citations omitted).

The Court held:

> "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . .* Congress has thus mandated the enforcement of arbitration agreements.

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of . . . a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' *We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitation under state law.*"

465 U.S. at 10-11, 104 S. Ct. at 858, 79 L. Ed. 2d at 12 (emphasis added).

The Court further observed that:

> "In creating a substantive rule applicable in state as well as federal courts, *Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.*"

Id. at 16, 104 S. Ct. at 861, 79 L. Ed. 2d at 15 (emphasis added).

The United States Court of Appeals for the Ninth Circuit has also recognized the import of the federal Arbitration Act in *Bayma v. Smith Barney, Harris Upham and Co.,* 784 F.2d 1023, 1025 (9th Cir. 1986), where it stated:

> "The clear teaching of the Supreme Court is that 9 U.S.C. § 2 (1982) *does not permit state law to carve out exceptions from arbitration merely because the state may prefer to have its citizens present their controversies in the court system. If the contract is one 'involving commerce,' then the question of arbitrability is controlled by federal law and not by state law. See Southland,* 465 U.S. at 16, 104 S. Ct. at 861." (Emphasis added.)

In the instant case, appellee entered into a contract evidencing a transaction involving commerce. *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 523 F.2d 433, 436-37 (6th Cir. 1975); *Dickstein v. duPont,* 443 F.2d 783, 785 (1st Cir. 1971). *Southland Corp., Moses H. Cone Memorial Hospital,* and *Bayma* clearly hold that the federal Arbitration Act preempts state law, including legislative attempts to create exceptions to arbitration such as California Labor Code section 229. Accordingly, appellee is required to arbitrate all of his claims against appellants, including his wage claim.

A different conclusion is not mandated by *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348. *Ware* involved a claim by a former Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") account executive for certain pension plan benefits of which he was divested when he terminated his employment to join a competitor. Ware brought an action against Merrill Lynch in the California Superior Court and Merrill Lynch filed a petition for an order directing arbitration, invoking California Code of Civil Procedure section 1281.2. *Id.* at 119-23, 94 S. Ct. at 386-88, 38 L. Ed. 2d at 355-57. The trial court denied the petition, relying on California Labor Code section 229. *Id.* at 123, 94 S. Ct. at 288, 38 L. Ed. 2d 357. As in this case, the Court of Appeal upheld the decision of the trial court, and a petition for hearing by the Supreme Court of California was denied without opinion. *Id.* at 123-25, 94 S. Ct. at 388-89, 38 L. Ed. 2d at 357-58.

On appeal to this Court, one of the issues presented was whether California Labor Code section 229 was federally preempted by the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a.-78*lll* (" '34 Act"). *Id.* at 125, 94 S. Ct. at 389, 38 L. Ed. 2d at 358. The California Supreme Court noted in its opinion in *Keating v. Superior Court,* 31 Cal.

3d 584, 603, 183 Cal. Rptr. 360, 371, 645 P.2d 1192, 1203 (1982), *modified on other grounds,* 465 U.S. 1, 104 S. Ct. 852, 78 L. Ed. 2d 1 (1984), that "[t]he [United States Supreme] court in *Ware* did not consider the applicability of the FAA [Federal Arbitration Act], and the holding in that case is consequently not controlling here. . . . " That same determination of the limited holding in *Ware* applies here.

Moreover, the Court's analysis in *Ware* has been superseded by legislative changes in the '34 Act, which changes suggest that the '34 Act, as well as the Arbitration Act, preempt California Labor Code section 229. The regulatory scheme of the '34 Act contemplates that the orderly and fair operation of the securities markets will be maintained by self-regulatory organizations such as the N.Y.S.E., subject to regulation by the S.E.C. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. at 127-31, 94 S. Ct. at 390-91, 38 L. Ed. 2d at 359-61. In *Ware,* Merrill Lynch argued that Rule 347 of the N.Y.S.E., providing for mandatory arbitration between a member firm and its registered representative, was part of the regulatory scheme of the '34 Act, and therefore preempted any applicable state law. *Id.* at 134, 94 S. Ct. at 393, 38 L. Ed. 2d at 363. However, when *Ware* was decided, the '34 Act gave the S.E.C. authority to review only those rules of the N.Y.S.E. promulgated for the protection of the public interest. *Id.* at 135-36, 94 S. Ct. at 393-94, 38 L. Ed. 2d at 363-64. The Court, in *Ware,* suggested that Rule 347 would preempt state law if it were subject to review by the S.E.C. under the S.E.C.'s statutory grant of authority. *See id.* at 139, 94 S. Ct. at 395, 38 L. Ed. 2d at 366. The Court held that because Rule 347 was not enacted for the purposes of assuring fair dealing with investors of the general public, and therefore was not subject to review by the S.E.C., it was not enacted as part of the statutory mandate of the '34

Act. *Id.* at 134, 94 S. Ct. at 393-95, 38 L. Ed. 2d at 363-65. The Court thus concluded that California Labor Code section 229 was not then in conflict with, or preempted by, the '34 Act.

In 1975, after *Ware* was decided, Congress amended Section 19(c) of the '34 Act to provide for S.E.C. review of *all* N.Y.S.E. rules, including Rule 347. *See* S.Rep.No. 94-75, 94th Cong., 1st Sess. 27-28, 31 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 179. As Judge Friendly observed, in so doing Congress:

> "expanded the 'area of supervised self-regulation,' broadening the objectives of self-regulation and prescribing a more active role of the SEC in the oversight of exchange rulemaking . . . . Under § 19(c) of the [amended] Act, the Commission may abrogate, add to, or delete from the rules of any exchange, as it 'deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purpose of this chapter. . . . ' Unlike the prior statute, the amended Act contains no subject matter restrictions on this authority. Rule changes by an exchange must be approved by the Commission as being consistent with the requirements of the Act and the rules and regulations thereunder before the changes can become effective. . . .
>
> [This obviates] the situation that the Court found so troublesome in *Ware*. . . ."

Drayer v. Krasner, 572 F.2d 348, 357-58 (2d Cir. 1978), *cert. denied,* 436 U.S. 948, 98 S. Ct. 2855, 56 L. Ed. 2d 791 (1978) (citations omitted).

In sum, the Court in *Ware* was of the view that because the '34 Act did not then provide for S.E.C. review of N.Y.S.E. Rule 347, there was no congressional intent discernible in the '34 Act that state laws in conflict with Rule 347 were preempted by federal law. However, since the *Ware* decision was rendered, the '34 Act has been expressly amended to provide for S.E.C. review of Rule 347, a clear expression of congressional intent to preempt any state law such as California Labor Code section 229 which might interfere with Rule 347.

Finally, *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. ____, 105 S. Ct. 1238, 84 L. Ed. 2d 158, does not support the decision of the Court of Appeal. The opposite is true. In *Byrd,* this Court stated that where arbitrable pendent state claims are factually intertwined with non-arbitrable securities claims:

> ". . . . the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."

Id. at ____, 84 L. Ed. 2d at 163, 105 S. Ct. at 1241.

That holding applies equally to state courts. In *Moses H. Cone Memorial Hospital,* 460 U.S. at 24, 103 S. Ct. at 941, 74 L. Ed. 2d at 785, this Court held that the Arbitration Act applies equally to proceedings in state and federal court. Thus, if appellee has a non-arbitrable claim for wages against appellants, his remaining claims must be ordered to arbitration under *Byrd.* State courts cannot avoid this holding by an *ipse dixit* which says that claims for conspiracy, fraud, and conversion are "essentially" wage claims because they arise of the same facts giving rise to the wage claims. Doing so would only

undermine Congress' clear intent that an agreement to arbitrate must be enforced, in either state of federal court, unless Congress itself has clearly indicated that a particular claim not be arbitrated. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* ____ U.S. ____, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444, 456 (1985).

CONCLUSION

For these reasons the Court should note probable jurisdiction.

Respectfully submitted,

PETER BROWN DOLAN
(Counsel of Record)
MAREN E. NELSON
LISA A. POPOVICH
OVERTON, LYMAN & PRINCE
Attorneys for Appellants

APPENDIX

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No. B014485

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THOMAS,
Respondent,
v.
PERRY ET AL.,
Appellants.

Appellants' petition for review DENIED.

Filed: July 10, 1986

Laurence P. Gill, Clerk
Deputy

BIRD
Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 5

Overton, Lyman & Prince,
Stephen E. Traverse
550 So. Flower St.
6th Floor
Los Angeles, CA 90071

Re: THOMAS, KENNETH MORGAN
vs.
KIDDER, PEABODY & CO, ET AL
2 Civil B014485
Los Angeles, No. 0529105

The Court:

Petition for Rehearing Denied. May 6, 1986

2d Civil No. B014485
(Super. Ct. No. C529105)

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

KENNETH MORGAN THOMAS,
Plaintiff and Respondent,

v.

BARCLAY PERRY ET AL.,
Defendants and Appellants.

Filed: April 10, 1986
Clay Robbins, Jr. Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

Overton, Lyman & Prince, Peter Brown Dolan and Maren E. Nelson for Defendants and Appellants.

Julian B. Fensten and Bruce Gelber for Plaintiff and Respondent.

Respondent Kenneth Morgan Thomas sued his former employer, Kidder, Peabody & Company, Inc., and two of its employees, appellants Barclay Perry and James Johnston. Thomas sought to recover a $40,000 commission he alleged is due to him by virtue of an oral contract with Kidder, Peabody and appellants. He sued for breach of contract, seeking damages of $40,000; and for conversion, conspiracy and breach of fiduciary duty, seeking damages of $150,000 for each cause of action. Thomas also sought punitive damages of $1½ million.

Appellants filed a motion to compel arbitration pursuant to an agreement Thomas signed at the time he was

hired by Kidder, Peabody.[1] It is undisputed that Kidder, Peabody brought a similar motion in federal court and is not a party to this appeal.

The trial court denied appellants' motion to compel, following *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware* (1973) 414 U.S. 117. The trial court found Thomas's suit to be "fundamentally an action to recover commissions." Under *Ware,* an action to collect wages may be pursued despite a private arbitration agreement, in accordance with California Labor Code section 229.[2]

Appellants contend first that Thomas's suit against them is not one for wages. They do not dispute that a commission is included in the statutory definition of wages found in Labor Code section 200. They argue that Thomas was not their employee and therefore could not have a wage claim against them. We agree with the trial court, however. Appellant Perry appears to have been Thomas's superior at Kidder, Peabody; Perry hired Thomas. Thus he may have been in a position to interfere with Thomas's receipt of his commission. Furthermore, Thomas alleged that appellants wrongfully received his commission. He seeks to recover it under a variety of theories. His action against appellants *is* an action for wages.

Appellants contend that Labor Code section 229 is preempted by the Arbitration Act, 9 United States Code

[1]Thomas raises for the first time on appeal the issue of whether appellants have standing to enforce the arbitration agreement. Because the issue was not raised at the trial court we will not consider it here. (*Apra* v. *Aureguy* (1961) 55 Cal.2d 827, 831.)

[2]Labor Code section 229 states in pertinent part: "Actions . . . for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."

sections 1 through 14. They argue that *Ware* resolved the narrow issue of whether section 229 was preempted by the Securities and Exchange Act of 1934, 15 United States Code sections 78a through 78ll, leaving open the question of preemption by the Arbitration Act. In fact, *Ware* does mention the Arbitration Act in footnote 15 at page 135. The footnote implies that the interpretation of the Securities and Exchange Act and the arbitration clauses found in stock exchange contracts are unaffected by the Arbitration Act. Moreover, the footnote indicates that the court had the Arbitration Act before it. If section 229 were preempted by the Arbitration Act, the court could have and presumably would have said so in *Ware.*

Appellants ask this court to find *Ware* superseded by subsequent changes in the Securities and Exchange Act, relying on *Drayer* v. *Krasner* (2d Cir. 1978) 572 F.2d 348, 357-358, cert. den. 436 U.S. 948.) We decline to so hold. *Drayer* discussed the amendment to the Securities Exchange Act and the *Ware* opinion in deciding whether the New York Stock Exchange requirement that all disputes between member firms and brokers be arbitrated violated federal antitrust statutes. *Drayer* was not a preemption case. Furthermore, the court in *Drayer* was speculating with respect to whether *Ware* would have had a different result had Congress amended the Securities and Exchange Act before *Ware* was decided. Finally, the Supreme Court itself cited *Ware* as recently as 1983 on the issue not before the court in *Drayer*, i.e., state preemption. (See *Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n* (1983) 461 U.S. 375, 389.) We take this action by the Supreme Court to mean that *Ware* is still a vital case, and still binding on us.[3] (*Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209, 221).

[3]Because we base our decision squarely on *Ware* we do not reach Thomas's alternative ground supporting the trial court's decision.

We agree with the trial court's conclusion that Thomas has brought a suit for the recovery of wages under several theories. The contract cause of action arises out of the oral agreement giving Thomas a right to commissions on certain stock sales. The law imposes obligations apart from agreements between parties to a contract. If, as is alleged, appellants interfered with Thomas's receipt of a commission, if they wrongfully deprived him of wages by their tortious conduct, they will be liable for the damages that flow therefrom. We do not agree with appellants' suggestion that Thomas's wage claim is severable from his tort claims, and that the later are arbitrable under *Dean Witter Reynolds, Inc. v. Byrd* (1985) ____ U.S.____, 105 S.Ct. 1238.

The judgment is affirmed.

NOT TO BE PUBLISHED.

ASHBY, Acting P.J.

We concur:

HASTINGS, J.

EAGLESON, J.

APPENDIX A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

vs.

KIDDER PEABODY & CO.,
BARCLAY PERRY, JAMES JOHNSTON,
Defendants.

PROPOSED STATEMENT OF DECISION
(CRC 232, CCP 632, 1291)

Original Filed: April 23, 1985
County Clerk

The specified issues listed in the defendants' April 16, 1985, request for Statement of Decision[1] are not "principal controverted issues." The following Proposed Statement of Decision sets forth the factual and legal bases for the court's ruling denying the petition and motion.

The within action is fundamentally an action to recover commissions allegedly earned as an employee of defendant. Counsel stipulated, and this Court so finds, that "commissions" as used in this case are "wages" as used in Labor Code Section 229. The ancillary causes of action for conversion, civil conspiracy and breach of fiduciary

[1]Defendants requested Statement of Decision along with proposals as to the content of said Statement on April 16, 1985. There have been no further proposals for content of the Statement of Decision. CRC 232(b). Plaintiff objected to the request for Statement of Decision on the grounds none was required.

duty do not change this action into something other than one by an employee seeking different remedies for alleged wrongful withholding of commissions. The alleged claims over and above the commissions sought arise, if at all, from defendants' actions in withholding the commissions and thus may properly be asserted along with the basic action for commissions.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware, 414 U.S. 117, controlling authority here, holds that in acordance with California Labor Code Section 229, actions to collect wages may be pursued without regard to private arbitration agreements. Accordingly, the within petition to compel arbitration and companion motion to stay proceedings in accordance with the private arbitration agreement between plaintiff and defendant are denied.

DATED: April 23, 1985.

ROBERT H. O'BRIEN
Judge of the Superior Court

2D CIVIL NO. B014485

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

KENNETH MORGAN THOMAS,
Plaintiff and Respondent,

VS.

BARCLAY PERRY and JAMES JOHNSTON,
Defendants and Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES
FROM THE DECISION OF THE CALIFORNIA
COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 5,
DATED APRIL 10, 1986

(PETITION FOR REVIEW DENIED, JULY 10, 1986)

(Received for filing in Clerk's Office: Sep 15 1986)

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Barclay Perry and
James Johnston

NOTICE IS HEREBY GIVEN that Barclay Perry and James Johnston, the appellants above-named, hereby appeal to the Supreme Court of the United States from the

final judgment of the Supreme Court of California, entered July 10, 1986, denying appellants' Petition for Review of the decision of the Court of Appeal of the State of California, Second Appellate District, Division 5, dated April 10, 1986 (Petition for Rehearing denied, May 6, 1986).

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: September 11, 1986.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

Attorneys for Defendants and Appellants Barclay Perry and James Johnston

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 550 South Flower Street, Sixth Floor, Los Angeles, California 90071-2467.

On September 15, 1986, I served the within Notice of Appeal to the Supreme Court of the United States on the interested parties in said action, by placing a copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Julian B. Fensten, Esq.
700 South Flower Street
22nd Floor
Los Angeles, California 90017

Clerk of Los Angeles County
Superior Court
111 North Hill Street
Room 109A
Los Angeles, California 90012

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed September 15, 1986 at Los Angeles, California.

CHRISTINE H. SIEGEL

2D CIVIL NO. B014485

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

KENNETH MORGAN THOMAS,
Plaintiff and Respondent,

VS.

BARCLAY PERRY and JAMES JOHNSTON,
Defendants and Appellants,

PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE

Received for Filing in Clerk's Office: May 20 1986

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2D CIVIL NO. B014485

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNETH MORGAN THOMAS,
Plaintiff and Respondent,

vs.

BARCLAY PERRY and JAMES JOHNSTON,
Defendants and Appellants,

PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

BARCLAY PERRY and JAMES JOHNSTON, defendants and appellants, respectfully petition for review following the decision of the Court of Appeal, Second Appellate District, Division Five, filed on April 10, 1986.

ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Whether California Labor Code § 229 has been preempted by the United States Arbitration Act, 9 U.S.C. §§ 1-14, thereby precluding an employee otherwise subject to an agreement to arbitrate from bringing an action in the Superior Court to collect wages;

2. Whether non-wage claims for conversion, civil conspiracy, and breach of fiduciary duty are arbitrable.

3. Whether respondent's claim against appellants is one for wages under Labor Code § 200.

STATEMENT OF THE CASE

Appellants Barclay Perry and James Johnston (collectively referred to as "appellants"), seek review of the Order of the Court of Appeal, Second Appellate District, Division 5, affirming the Order of the Superior Court of the State of California for the County of Los Angeles which denied appellants' Motion for Order Staying Proceedings and Petition for Order Compelling Arbitration. Respondent Kenneth Morgan Thomas ("respondent") opposes said stay of proceedings and arbitration.

Respondent is a former employee of Kidder, Peabody & Co., Incorporated ("Kidder, Peabody") (Ct 4, 26-30, 54: 2-5).[1] Appellants are also employees of Kidder, Peabody. (CT 4, 55:3-7). On or about August 23, 1982, in connection with his application for employment by Kidder, Peabody, respondent executed a Uniform Application for Securities Industry Registration on Form U-4 ("Form U-4") (Ct 29-30). Form U-4 provides, at paragraph 5, that:

> "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . ."

(CT 30).

Among the organizations with which respondent was registered is the New York Stock Exchange, Inc. ("N.Y.S.E."). (Ct 16:23). Rule 347 of the N.Y.S.E. provides that:

> "Any controversy between a registered representative and any member or member organization arising

---

[1]Ct refers to clerk's transcript by page(s): line(s).

> out of the employment or termination of employment of such registered representative by and with such member or member organization *shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed in these rules."*

(CT 31). (Emphasis supplied.)

In May, 1984, a dispute arose between respondent and Kidder, Peabody concerning certain commissions allegedly owed to respondent by Kidder, Peabody. On January 4, 1985, respondent filed a Complaint in the Los Angeles Superior Court against Kidder, Peabody and appellants. (Ct 1-8). The Complaint seeks $40,000 for breach of contract to pay commissions and $150,000 actual damages for conversion, civil conspiracy, and breach of fiduciary duties. The Complaint also prays for exemplary and punitive damages. (Ct 3).

In response to respondent's Complaint, appellants demanded arbitration of respondent's claims against them. Respondent refused to submit the dispute to arbitration, and accordingly, appellants filed a Motion for Order Staying Proceedings ("Motion") and Petition for Order Compelling Arbitration ("Petition") in the Los Angeles Superior Court (Ct 14 and 15). Said Motion and Petition were based on the ground that respondent had entered into a written agreement to arbitrate the controversies asserted in the Complaint. (Ct 16:1-17:13). Respondent's claims against Kidder, Peabody were not addressed by the Petition, as Kidder, Peabody did not join in the Petition.[2]

---

[2]Kidder, Peabody instead filed a separate Petition to Compel Arbitration in the United States District Court for the Central District of California based on the United States Arbitration Act and the diversity of citizenship between it and respondent.

The hearing on appellants' Motion and Petition was held on April 10, 1985 before the Honorable Robert H. O'Brien, Judge of the Superior Court ("the Court") (Ct 91). After hearing argument by counsel for the parties, the Court denied the Motion and Petition. On April 23, 1985, the Court filed its Statement of Decision which provides, in relevant part, as follows:

> "The within action is fundamentally an action to recover commissions allegedly earned as an employee of defendant. Counsel stipulated,[3] and this Court so finds, that 'commissions' as used in this case are 'wages' as used in Labor Code § 229. The ancillary causes of action for conversion, civil conspiracy and breach of fiduciary duty do not change this action into something other than one by an employee seeking different remedies for alleged wrongful withholding of commissions. The alleged claims over and above the commissions sought arise, if at all, from defendants' actions in withholding the commissions and thus may properly be asserted along with the basic action for commissions.
>
> *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware,* 414 U.S. 117, controlling authority here, holds that in accordance with California Labor Code Section 229, actions to collect wages may be pursued without regard to private arbitration agreements. Accordingly, the within petition to compel arbitration and companion motion to stay proceedings in accordance

---

[3]Counsel for appellants stipulated that "commissions" are included in the definition of "wages" set forth in Labor Code § 200.

with the private arbitration agreement between plaintiff and defendant are denied."

(CT 111:22-112:17)

Appellants appealed to the Court of Appeal of the State of California, based on the ground that the United States Arbitration Act preempted California Labor Code § 229, and, therefore, the arbitration agreement was enforceable. The appellants also appealed on the grounds that the claims for conversion, civil conspiracy and breach of fiduciary duty should be submitted to arbitration even if the wage claims were non-arbitrable, and that the Labor Code § 229 did not apply since the appellants, as co-employees, were not liable for the payment by Kidder, Peabody of the commissions claimed by respondent.

On April 10, 1986, the Court of Appeal, Second Appellant District, Division Five, affirmed the trial court's decision. The Court of Appeal stated that respondent's action against the appellants is an action for wages. Further, the Court of Appeal held that *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware,* is still binding on (it). Additionally, the Court of Appeal stated that the respondent's wage claim was not severable from his tort claims, and, therefore, his tort claims did not have to be submitted to arbitration under *Dean Witter Reynolds, Inc. v. Byrd* (Opinion at 6.) Appellants' petition to the Court of Appeal for rehearing was denied on May 6, 1986.

I. THIS COURT SHOULD REVIEW THE COURT OF APPEAL DECISION

California Rule of Court 29(a) provides that "[r]eview by the Supreme Court of a decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important

questions of law. . . ." *See also, People v. Davis,* 147 Cal. 346, 348 81 P. 718 (1905).

The issues presented by this Petition for Review are questions which must be reviewed in order to settle a current dispute among the Courts of Appeal as to the preemptive effect of the federal Arbitration Act. Several Courts of Appeal have held that federal law applies to the enforceability of arbitration clauses involving security brokers. *See e.g. Thorup v. Dean Witter Reynolds, Inc.*, 86 Daily Journal D.A.R. 1451 (May 7, 1986); *Tonetti v. Shirley*, 173 Cal.App.3d 1144, 219 Cal.Rptr. 616 (1985); *Chan v. Drexel Burnham Lambert, Inc.*, 86 Daily Journal D.A.R. 863 (March 21, 1986). Nonetheless, Division Five of the Second Appellate District rejected that position in this case. As the issue is central to the relationship of all interstate employers having arbitration agreements with their employees, review by this Court is appropriate under Rule 29(a)(1).

II. THE UNITED STATES ARBITRATION ACT PREEMPTS CALIFORNIA LABOR CODE SECTION 229

Labor Code § 229 provides that an action to *enforce* the provisions of this article (Article 1 — General Occupations) for the collection of due and unpaid wages claimed by an individual "may be maintained without regard to the existence of any private agreement to arbitrate." This section is in direct conflict with the United States Arbitration Act, 9 U.S.C. § 2, which declares that a written agreement to arbitrate "in . . . a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds that exists at law or in equity for the revocation of any contract."

The United States Supreme Court has made it clear that where, as here, a question of arbitrability arises under an agreement which effects interstate commerce, federal law in terms of the Arbitration Act [9 U.S.C. § 1-14] governs the issue of arbitrability "in either state or federal court." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1, (1984); *Dean Witter Reynolds, Inc. v. Byrd,*____ U.S. ____, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

In *Moses H. Cone*, the United States Supreme Court held that:

> "Section 2 is the primary substantive provision of the Act . . . Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.* The effect of the section is to create a body of federal substantive law of arbitrability, applicable to *any arbitration agreement* within the coverage of the Act." [Emphasis added]

460 U.S. at 24, 74 L.Ed.2d at 765. The United States Supreme Court also stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor or arbitration. . . ." *Id.*

The United States Supreme Court reiterated this statement of law in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), in which plaintiff argued that the California Franchise Investment Law prohibited arbitration of a dispute. In finding that the dispute was arbitrable *despite* the California Franchise Investment

Law prohibition, the United States Supreme Court squarely held that:

> "In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . .* Congress has thus mandated the enforcement of arbitration agreements.
>
> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of . . . a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the Act indicating that the broad principle of enforceability is subject to *any additional limitation under state law.*" (Emphasis supplied).

465 U.S. at 10-11, 79 L.Ed.2d at 12. The Supreme Court further observed that:

> "In creating a substantive rule applicable in state as well as federal courts, *Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.*" (Emphasis supplied).

465 U.S. at 16, 79 L.Ed.2d at 15.

The United States Court of Appeals for the Ninth Circuit has also recognized the import of the federal Arbitration Act in *Bayma v. Smith, Barney, Harris &*

Upham, 784 F.2d 1023, 1025 (9th Cir. 1986), where it stated:

> "The clear teaching of the Supreme Court is that 9 U.S.C. §2 (1982) does not permit state law to carve out exceptions from arbitration merely because the state may prefer to have its citizens present their controversies in the court system. If the contract is one 'involving commerce,' then the question of arbitrability is controlled by federal law and not by state law."

In the instant case, respondent entered into a contract "evidencing a transaction involving commerce." *Southland, Moses H. Cone,* and *Bayma* clearly hold that the federal Arbitration Act preempts state law, including legislative attempts to create exceptions to arbitration such as Corporations Code § 31512 and Labor Code § 229. Accordingly, this Court, in accordance with the decisions of the United States Supreme Court and the United States Courts of Appeals, must hold that respondent is required to arbitrate his claim in accordance with the contract, regardless of Labor Code § 229.

This conclusion has been suggested by several state Courts of Appeal, most recently in *Thorup v. Dean Witter Reynolds, Inc.*, 86 Daily Journal D.A.R. 1451 (May 7, 1986). There, the First Appellate District stated:

> "It is indisputable that an employment contract involving an account executive of a brokerage firm is a contract 'involving commerce,' and is subject to the [federal Arbitration] Act. (*Merrill Lynch, Pierce, Fenner & Smith v. Hovey* (8th Cir. 1984) 726 F.2d 1286, 1288; *Stokes v. Merrill Lynch, Pierce Fenner & Smith* (6th Cir. 1975) 523 F.2d 433, 436-437; *Dickstein v. duPont* (1st Cir. 1971) 443 F.2d 783, 785;

> *Merrill Lynch, Pierce, Fenner & Smith v. Shubert* (M.D.Fla. 1983) 577 F.Supp. 406; *Legg, Mason & Company, Inc. v. Mackall & Coe., Inc.* (D.D.C. 1972) 351 F.Supp. 1367, 1370-1371).... [It] is now generally agreed that federal law applies to enforceability of arbitration clauses involving security brokers (*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 23-25; *Dickinson v. Heinold Securities, Inc.* (7th Cir. 1981) 661 F.2d 638, 643-646; *Garmo v. Dean Witter, Reynolds, Inc.* (1984) 101 Wn.2d 585 [681 P.2d 253, 254-255])."

Thorup at pages 5 and 6 of slip opinion and 1451 of D.A.R.

Likewise in *Tonetti v. Shirley*, 173 Cal.App.3d 1144, 219 Cal.Rptr. 616 (1985), the Fourth Appellate District, Division Three, held that California law is preempted by the Federal Arbitration Act. In *Tonetti*, a dispute arose between a stock brokerage firm (Kidder, Peabody) and an employee (a registered representative, like respondent herein) regarding the firm's "allegedly defamatory statements and writings referring to Tonetti's [the employee's] qualifications and performance as a stock broker and investment analyst." *Id.* at 1146. The employee relied on *Hope v. Superior Court*, 122 Cal.App.3d 147, 175 Cal.Rptr. 851 (1981), for the proposition that the arbitration agreements he signed, in connection with his employment with the firm, were unconscionable and nonbinding under California adhesion contract principles. In holding the arbitration agreements binding and California adhesion contract principles irrelevant, the Fourth District Court of Appeal stated that "[r]ecent United States Supreme Court cases have made it clear this federal statute [Federal Arbitration Act] preempts state law on the issue of arbitrability of an agreement falling

under the Act." *Id.* at 1147 (*citing Southland v. Keating, supra*, 465 U.S. 1; *Moses H. Cone Hospital v. Mercury Construction Co., supra*, 460 U.S. 1). *See also Chan v. Drexel Burnham Lambert, Inc.*, 86 Daily Journal D.A.R. 863, 864 (filed March 10, 1986, published March 21, 1986).

A different conclusion is not mandated by *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed. 2d 348 (1973). In *Ware*, the issue before the United States Supreme Court was "the extent to which authority under a *federal regulatory statute* [the *Securities Exchange Act of 1934*, 15 U.S.C. §§ 78a-78111 (" '34 Act")] pre-empts state law [Labor Code § 229]." (Emphasis added) 414 U.S. at 125, 38 L.Ed.2d at 358. The *Ware* Court did *not* decide the pre-emptive scope of the federal Arbitration Act, as this Court recognized in *Keating v. Superior Court*, 31 Cal.3d 584, 183 Cal.Rptr. 340 (1982), *modified on other grounds*, 465 U.S. 1, 104 S.Ct. 852, 78 L.Ed. 2d 1 (1984). The California Supreme Court in *Keating*, in deciding whether the federal Arbitration Act preempted the California Franchise Investment Law, stated that "[t]he [United States Supreme] Court in *Ware* did not consider the applicability of the FAA [Federal Arbitration Act], and the holding in the case *is consequently not controlling here*...." 31 Cal.3d at 603 (Emphasis added). That same determination of the limited holding in *Ware* applies here.

Moreover, *Ware* is a dead letter. When *Ware* was decided, the '34 Act did not authorize the S.E.C. to review N.Y.S.E. rules requiring arbitration of a registered representative's dispute. *Id.* at 135 n.14. The Court in *Ware* was of the view that because the United States Securities & Exchange Commission ("S.E.C.") was not empowered to review all N.Y.S.E. rules, there was no Congressional

intent to generally supersede state law with the '34 Act. However, after the *Ware* decision was rendered, the '34 Act was expressly amended to provide for S.E.C. review of Rule 347, a clear expression of Congressional intent to preempt any state law which might interfere with Rule 347.

Thus, in view of both the recognition by the Courts of Appeal that the relationship of a registered representative/employee and his N.Y.S.E. member firm are governed by federal law, and the decisions of both the Ninth Circuit and the United States Supreme Court that state laws purporting to carve out exceptions from arbitration are preempted by the federal Arbitration Act, this Court must hold that Labor Code § 229 has, in this instance, been preempted by the federal Arbitration Act. Further, § 229 expressly refers to *action to enforce* the provisions of [Article 1] and the authority to *enforce* the article is expressly given to the Division of Labor Law Enforcement by § 217, *not* to private litigants or employees such as respondent. The reference to a "wage claimant" (such as respondent) in § 218 does not constitute a grant of authority to *enforce* the article.

III. ALTERNATELY, IF RESPONDENT'S WAGE CLAIM IS NOT ARBITRABLE, HIS REMAINING CLAIMS MUST BE ORDERED TO ARBITRATION

The claims brought by respondent are clearly governed by federal law, which provides that where arbitrable claims are intertwined with nonarbitrable claims, the court is required to order the arbitrable claims to arbitration. *Dean Witter Reynolds v. Byrd,* ____, U.S. ____, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) so held. There the United States Supreme Court stated:

> "... the Arbitration Act requires that district courts to compel arbitration of pendant arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."

84 L.Ed.2d at 158, 105 S.Ct. at 1238.

Accordingly, this Court should decide that even if respondent has a nonarbitrable claim for wages against appellants, his remaining claims for civil conspiracy, conversion and breach of fiduciary duty must be ordered to arbitration under the authority of *Byrd*.

IV. ANY CLAIMS BY THE RESPONDENT AGAINST THE APPELLANTS, CO-EMPLOYERS, ARE NOT WAGE CLAIMS

In the instant case, an employee (respondent) is attempting to seek payment for commissions allegedly due from his employer (Kidder, Peabody) from co-employees (appellants). Respondent was not, and does not claim, that he was an employee of appellants or either of them. The claim of actual damages of $150,000, sought by respondent for alleged conversion, civil conspiracy and breach of fiduciary duty is not a claim for wages, and respondent's reliance on Labor Code § 229 is therefore misplaced. A reading of the Labor Code makes it clear that the code establishes the rights of employees *as against an employer*. For example, within the Labor Code provision regarding the payment of wages, it provides that an "*employer* shall pay ... wages." [§ 206] (Emphasis added.) Similarly, § 206.5 provides that "[n]o *employer* shall require the execution of any release." (Emphasis added.)

In order for there to be a correct and uniform application of the Labor Code, this Court should review this issue and hold that the respondent's claims against the appellants for commissions are not wage claims, as the appellants are not employers but are only co-employees.[5] Accordingly, Labor Code § 229 would not apply to the respondent's claims against the appellants.

V. CONCLUSION

For the reasons stated, this Petition for Review should be granted, and this cause should be set for argument.

Respectfully submitted,

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON
LISA A. POPOVICH
Attorneys for Defendants
and Appellants
BARCLAY PERRY and
JAMES JOHNSTON

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[5]It should be noted that in plaintiff's complaint plaintiff failed to state that he had suffered any wage loss. (Complaint at 3, ¶ 8).

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION

Thomas	Kenneth	Morgan	
08/16/82	07613	Kidder, Peabody &Co., Inc.	
10 Hanover Square		New York	NY 10005
82L	707 Wilshire Boulevard, Suite 3100	Los Angeles,	CA 90017

SRO: 2

STATE: EXAM REQUIRED

WILL APPLICANT MAINTAIN REGISTRATION WITH ANOTHER BROKER/DEALER? [ ] [X]

TYPE OF APPROVAL REQUESTED:

- [ ] AGENT OF ISSUER
- [ ] ALLIED MEMBER
- [ ] APPROVED PERSON (EXCHANGE)
- [ ] BRANCH OFFICE MANAGER
- [ ] DIRECT PARTICIPATION PROGRAMS PRINCIPAL
- [ ] DIRECT PARTICIPATION PROGRAMS REPRESENTATIVE
- [ ] FINANCIAL AND OPERATIONS PRINCIPAL
- [X] FULL REGISTRATION-GENERAL SECURITIES REPRESENTATIVE
- [ ] GENERAL SECURITIES PRINCIPAL
- [ ] INVESTMENT COMPANY AND VARIABLE CONTRACTS PRODUCTS PRINCIPAL
- [ ] INVESTMENT COMPANY AND VARIABLE CONTRACTS PRODUCTS REPRESENTATIVE
- [ ] MANAGER OFFICE OF SUPERVISORY JURISDICTION
- [ ] MEMBER (EXCHANGE)
- [ ] MUNICIPAL SECURITIES FINANCIAL AND OPERATIONS PRINCIPAL
- [ ] MUNICIPAL SECURITIES PRINCIPAL
- [ ] MUNICIPAL SECURITIES REPRESENTATIVE
- [X] OFFICER (TITLE): Vice President
- [ ] REGISTERED COMMODITY REPRESENTATIVE
- [ ] REGISTERED OPTIONS PRINCIPAL
- [ ] SOLE PROPRIETOR
- [ ] SUPERVISORY ANALYST
- [ ] OTHER

APPLICANT WILL BE DESIGNATED: (ANSWER ONLY IF APPLICABLE)

- [ ] CHIEF FINANCIAL AND OPERATIONS PRINCIPAL
- [ ] SENIOR REGISTERED OPTIONS PRINCIPAL
- [ ] COMPLIANCE REGISTERED OPTIONS PRINCIPAL

HAS APPLICANT EVER PASSED AN EXAMINATION, BEEN GRANTED A WAIVER OR QUALIFIED FOR EXEMPTION FROM AN EXAMINATION FOR REGISTRATION IN ANY CAPACITY WITH ANY AGENCY, JURISDICTION, SELF-REGULATORY ORGANIZATION OR COMMISSION? IF SO, INDICATE BELOW:

SRO/SCI. BODY	DATE	EXAM/QUALIFICATION	EXPIRATION DATE
NASD	12/69	Series 1	
NYSE	1970	SERIES 7	

Kenneth Morgan Thomas 8-25-82
SIGNATURE OF APPLICANT — DATE

Kenneth Morgan Thomas
NAME OF APPLICANT (PRINT OR TYPE)

8-25-82
SIGNATURE OF APPROPRIATE SIGNATORY — DATE

G. Barclay Perry
NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

8-25-82 9-15-82

14734

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PERSONAL HISTORY — If there is [illegible] to this page, check question number(s) on page

Thomas	Kenneth	Morgan					564-62-2944
17 Seacove Drive	Rancho Palos Verdes					CA	90274
07/29/44	Phila PA		5'10"	180	brown	Male	brown
None	None						M
Donna Gail Thomas	Sebrianne						
Carl Thomas	Dovie White						

EDUCATIONAL HISTORY — Please fill in for each Educational Institution attended with complete address (Street, City, State, Zip Code)

Name and Address of Institution (Exclude Elementary School)	From Month	From Year	To Month	To Year	Course	Day or Evening	Did You Graduate?	Degree	
USC Univ. Park Los Angeles, CA 90017	9	68	2	69	Grad	day	Yes		1401
UCLA Westwood Los Angeles, CA 90049	9	67	2	68	Grad	day	Yes		1403
USC LOS ANGELES CA 90017	9	63	6	66		day	Yes	BA	1405
Cornell Univ. Ithaca, NY 14853	9	62	6	63	Philosophy				1407

BUSINESS HISTORY — List each position for the past ten years, starting with current position. Include self-employment, unemployment, part-time and all military service. If necessary, continue on separate sheet. Please fill in complete address (Street, City, State, Zip Code)

Name and Complete Address of Employer	From Month	From Year	To Month	To Year	Full or Part Time	Position Held	Reason for Leaving	
Kidder Peabody & Co., Inc. 707 Wilshire Blvd., Suite 3100, Los Angeles, CA 90017	8	82	present		full	V.P.	N/A	1501
Jefferies & Co. 530 W. Sixth St., Los Angeles, CA 90014	3	81	8	82	full	1st V.P.		1503
John Muir & Co. Phoenix, AZ 85004	10	80	3	81	full	R.R.		1505
Self-employed 918 Fallen Leafway, Sacramento, CA 95825	3	80	10	80	full	Personal Inv.	relocate	1507
Jefferies & Co. Phoenix, AZ 85004	4	79	3	80	full	Trader	personal	1509

ARE YOU CURRENTLY ENGAGED IN ANY OTHER BUSINESS EITHER AS PROPRIETOR, PARTNER, OFFICER, DIRECTOR, TRUSTEE, EMPLOYEE, AGENT OR OTHERWISE? (1000)

YES [ ] NO [X] IF YES, EXPLAIN _____

RESIDENTIAL HISTORY — Give all home addresses for the past ten years (other than current address). If necessary continue on separate sheet.

Address — Street	City	State	Zip	From Month	From Year	To Month	To Year	
5 Clipper Road,	Rancho Palos Verdes,	CA	90274	3	81	6	82	1601
								1603
823 E. Cochise Drive,	Phoenix,	AZ	85020	10	80	3	81	1605
918 Fallen Leafway,	Sacramento,	CA	95825	3	80	10	80	1609

I authorize and request any and all of my former employers and any other person to furnish to the agency, jurisdiction or organization with which this application is being filed, or any agent acting on its behalf, any information they may have concerning my credit worthiness, character, ability, business activities, educational background, general reputation, together with, in the case of former employers, a history of my employment by them and the reasons for the termination thereof. Moreover, I hereby release each such employer and each such other person from any and all liability of whatever nature by reason of furnishing such information to the agency, jurisdiction or organization or any agent acting on its behalf.

Further, I recognize that I may be the subject of an investigative consumer report ordered by the agency, jurisdiction, or organization with which this application is being filed, and that I have the right to request complete and accurate disclosure by such agency, jurisdiction, or organization of the nature and scope of the investigation requested.

Kenneth Morgan Thomas — NAME OF APPLICANT (PRINT OR TYPE)

Kenneth Morgan Thomas — SIGNATURE OF APPLICANT — 8-25-82 DATE

G. Barclay Perry — NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

SIGNATURE OF APPROPRIATE SIGNATORY — 8/25/82 DATE

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TEN YEAR LIMIT DOES NOT APPLY TO QUESTIONS 27 [illegible] ROUGH 29.

[illegible] ANSWER "YES" TO ANY QUESTION [illegible] AND ATTACH COMPLETE DETAILS

Have you ever:	YES	NO	
A. been the subject of a regular complaint or legal proceeding?	☐	X	2720
B. been disciplined, or requested or permitted to resign for cause?	☐	X	2730
C. been refused coverage under a fidelity or surety bond, or has any surety company paid out any funds on your coverage or requested such coverage?	☐	X	2735
D. had a license, permit, certificate, registration or membership denied, suspended, revoked or restricted, or had an application withdrawn for cause?	☐	X	2560
E. been the subject of any order, judgment, decree or other action of a foreign court, foreign exchange, or foreign governmental or regulatory agency?	☐	X	2940
F. been arrested or indicted for any felony or misdemeanor involving the purchase, sale or delivery of any security or commodity, or arising out of the conduct of the business of a broker, dealer, municipal securities dealer, fiduciary, investment company, investment adviser, underwriter, bank, trust company, insurance company or other financial institution, or involving any crime in which violence or threats of violence against any person, dishonesty, wrongful taking of any property, or any element of fraud was a factor, or involving conspiracy to commit any of the foregoing?	☐	X	2830
G. been convicted, or pleaded guilty or nolo contendere to any felony or misdemeanor except minor traffic offenses?	☐	X	2670
H. been a principal or employee of any firm, corporation or association which, while you were associated with it, was convicted of, or pleaded guilty or nolo contendere to, any felony or misdemeanor?	☐	X	2680
I. or has any firm, corporation or association of which you have been a principal or officer listed in bankruptcy, made a composition with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	X	2780

While associated in any capacity in the securities, commodities, investment advisory, real estate, banking or insurance industry or any other business have you ever:	YES	NO	
A. been found by the Securities and Exchange Commission or in any jurisdiction to have willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for registration or report required to be filed under the Federal securities laws or under the securities law of any jurisdiction, or in any proceeding before the Securities and Exchange Commission or any jurisdiction relating to securities, the conduct of business or registration as a broker, dealer, municipal securities dealer, or investment adviser or associated person thereof?	☐	X	2880
B. willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, in any report required to be filed with a self-regulatory organization, or in any proceeding before a self-regulatory organization?	☐	X	2890
C. had any temporary or permanent injunction or administrative order entered against you or any broker, dealer, investment adviser, municipal securities dealer, bank or commodities firm with which you were associated in any capacity at the time such injunction was entered?	☐	X	2900
D. been associated in any capacity with any broker, dealer, municipal securities dealer, investment adviser or commodity firm which was suspended, expelled or had its registration denied or revoked by any agency, jurisdiction or organization?	☐	X	2620
E. been found to be the cause of any action cited in 27D?	☐	X	2910
F. been associated as an officer, a director, a general partner, or an owner of 10 percent or more of the voting securities in, or a person who, directly or indirectly, through agreement or otherwise, exercised or had power to exercise a controlling influence over the management or policies of a broker, dealer or municipal securities dealer which had been adjudicated bankrupt or for which a trustee has been appointed pursuant to the Securities Investor Protection Act of 1970?	☐	X	2760

Are you currently:	YES	NO	
A. the subject of any unsatisfied judgments or liens?	☐	X	2740
B. associated in any endeavor related directly or indirectly to business or financial activities with any person whom you know, or in the exercise of reasonable care should know, to be subject to a statutory disqualification?	☐	X	2920
C. the subject of any investigation or proceeding, or have you ever been the subject of discipline or found to have violated or to have aided, abetted, counselled, commanded, induced or procured the violation of any law, rule or regulation by any securities, commodities or banking agency or jurisdiction, any national securities exchange, registered securities association or clearing agency or by any other agency or jurisdiction?	☐	X	2702

Kenneth Morgan Thomas
NAME OF APPLICANT (PRINT OR TYPE)

Kenneth Morgan Thomas 8-23-82
SIGNATURE OF APPLICANT — DATE

NASAA/NASD CRD NO

G. Barclay Perry
NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

8/25/82
SIGNATURE OF APPROPRIATE SIGNATORY — DATE

ATTACH PASSPORT SIZE AND QUALITY PHOTO

Kenneth M. Thomas
APPLICANT'S NAME (Type or print)

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1. I hereby certify that I have read and understand the foregoing statements and that my responses are true and complete to the best of my knowledge.

2. I hereby apply for registration with the organizations and states indicated in Question 8 and, in consideration of such organizations and states reviewing and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and provisions of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directions and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the merits of any recommendation that I may be required to pass will be accepted by me as final.

3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable to me for actions taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of such states and organizations.

4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.

6. I, the undersigned, for the purpose of complying with the laws of the State(s) I have designated in Item 8 relating to either the registration or sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process of pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I was a resident in said State and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

8/25/82 — DATE
[illegible] — SIGNATURE OF APPLICANT

WITNESS MUST BE ONE OF THE FOLLOWING. PLEASE CHECK APPROPRIATE BOX

☐ PARTNER OF THE FIRM ☐ BRANCH OFFICE MANAGER
☐ OFFICER OF THE CORPORATION ☐ AUTHORIZED EMPLOYEE

STATE OF CALIFORNIA COUNTY Los Angeles ss:

SUBSCRIBED AND SWORN BEFORE ME THIS 25 DAY OF AUGUST A.D. 19 82 BY [illegible]

OFFICIAL SEAL
[illegible]
NOTARY PUBLIC - CALIFORNIA
COUNTY OF LOS ANGELES
MY COMMISSION EXPIRES JUNE 25, 1983

NOTARY PUBLIC

MY COMMISSION EXPIRES [illegible] COUNTY OF [illegible] STATE OF [illegible]

To the best of [illegible] and belief, [illegible] properly bonded where required, and, at the time of approval, will be familiar with the statute(s), rule(s), regulation(s), [illegible] self-regulatory organization with which this application is being filed, and the rules governing registered persons [illegible] the Securities [illegible] which application is being made herein. I agree that, notwithstanding the interest of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all the previous employers of the applicant during the past three years, as set forth below:

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	MAY CONTACT? YES	MAY CONTACT? NO	MAY CONTACT? LIMIT USE
Jefferies & Co.	Neal F. Nakagiri	V.P., Compliance	3/81	8/82	X		
John Muir & Co	DEFUNCT		10/80	3/81			
Jeffries & Co	NEAL F. NAKAGIRI	V.P. COMPLIANCE	4/79	10/80	X		

Please Do Not Write In This Area

In addition, I have taken appropriate steps to verify the statements contained in the application and to inquire into the past record and reputation of the applicant.

8/19/82 — DATE
G. Barclay Perry — PRINT NAME OF APPROPRIATE SIGNATORY
[illegible] — SIGNATURE OF APPROPRIATE SIGNATORY

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#26. Employment History (cont'd)

Eppler, Guerin, Turner 2001 Bryan Tower, Dallas, TX 75205	7/78 to 4/79	full trader	personal
Self-employed 1104 Washington Ave., Santa Monica, CA 90024	12/76 to 7/78	Personal Inv.	
Morgan, Stanley & Co. 1251 Ave. of Americas, NY, NY 10017	3/76 to 12/76	full trader	personal
E.F. Hutton & Co. 1 Battery Park Plaza N.Y. N.Y. 10005	9/72 to 2/76	full trader	relocate
Canton, Fitzgerald & Co. 232 Canon Drive, Beverly Hills, CA 90024	6/71 to 9/72	full trader	personal
Jefferies & Co. 3300 Union Bank Square, Los Angeles, CA 90071	1/70 to 6/71	full trader	personal

#27. Residential History (Cont'd)

7229 Holly Hill Drive, Dallas, TX 75231	7/78 to 3/80
1104 Washington Ave., Santa Monica, CA 90024	12/76 to 7/78
101 W. 57th St., N.Y., NY 10009	3/76 to 12/76
35-24th Place, Venice, CA 90254	7/75 to 2/76
116 Central Park, South, NY, NY 10005	9/72 to 7/75
700 Orange Grove Terrace, So. Pasadena, CA 91101	11/70 to 9/72

Case Number: 0529105

ORIGINAL FILED
Jan. 4, 1985
COUNTY CLERK

Attorney or party without Attorney
(Name and Address) Telephone

Julian B. Fensten
A Professional Corporation
700 S. Flower St., 22nd Floor
Los Angeles, CA 90017
Attorney for Plaintiff

Insert name of court, judicial district or branch court, if any, and post office and street address:
Superior Court, County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

Plaintiff: Kenneth Morgan Thomas

Defendant: Kidder, Peabody & Co., Barclay Perry, James Johnston
☒ Does 1 to 20

COMPLAINT Personal Injury, Property Damage, Wrongful Death

☐ Motor Vehicle
☐ Property Damage
☐ Personal Injury
☒ Other (specify): Conversion; Conspiracy to Commit Conversion; Breach of Fiduciary Duty; Breach of Contract
☐ Wrongful Death
☒ Other Damages (specify): Exemplary and Punitive Damages

1. This pleading, including attachments and exhibits, consists of the following number of pages: 8

2. a. Each plaintiff named above is a competent adult
   ☐ Except plaintiff (name):
   ☐ a corporation qualified to do business in California
   ☐ an unincorporated entity (describe):
   ☐ a public entity (describe):
   ☐ a minor ☐ an adult
   ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
   ☐ other (specify):

☐ other (specify):
☐ Except plaintiff (name):
☐ a corporation qualified to do business in California
☐ an unincorporated entity (describe):
☐ a public entity (describe):
☐ a minor ☐ an adult
☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
☐ other (specify):
☐ other (specify):

b. ☐ Plaintiff (name):
is doing business under the fictitious name of (specify):

and has complied with the fictitious business name laws.

c. ☐ Information about additional plaintiffs who are not competent adults is shown in Complaint — Attachment 2c.

3. a. Each defendant named above is a natural person
☒ **Except** defendant *(name):*
Kidder, Peabody & Co.
☒ a business organization, form unknown
☒ a corporation
☒ an unincorporated entity *(describe):*
A Partnership or a Sole Proprietor
☐ a public entity *(describe):*
☐ Other *(specify):*

☒ **Except** defendant *(name):*
Does 1-20
☒ a business organizaton, form unknown
☒ a corporation
☒ an unincorporated entity *(describe):*
A Partnership or a Sole proprietor
☐ a public entity *(describe):*
☐ other *(specify):*

☒ **Except** defendant *(name):*

Barclay Perry
☒ a business organization, form unknown
☒ a corporation
☒ an unincorporated entity *(describe):*
A Partnership or a Sole Proprietor
☐ a public entity *(describe):*
☐ other *(specify):*

☐ **Except** defendant *(name):*
☐ a business organization, form unknown
☐ a corporation
☐ an unincorporated entity *(describe):*
☐ a public entity *(describe):*
☐ other *(specify):*

b. ☐ The true names and capacities of defendants sued as Does are unknown to plaintiff.

c. ☐ Information about additional defendants who are not natural persons is contained in Complaint — Attachment 3c.

d. ☐ Defendants who are joined pursuant to Code of Civil Procedure section 382 are *(names):*

4. ☐ Plaintiff is required to comply with a claims statute, **and**
a. ☐ plaintiff has complied with applicable claims statutes, **or**
b. ☐ plaintiff is excused from complying because *(specify):*

5. This court is the proper court because
☒ at least one defendant now resides in its jurisdictional area.
☒ the principal place of business of a corporation or unincorporated association is in its jurisdictional area.
☒ injury to person or damage to personal property occurred in its jurisdictional area.
☒ other *(specify):* See paragraph 9

6. ☐ The following paragraphs of this complaint are alleged on information and belief *(specify paragraph numbers):*

7. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are
   ☐ listed in Complaint — Attachment 7 ☐ as follows:

8. Plaintiff has suffered
   ☐ wage loss
   ☐ hospital and medical expenses
   ☐ property damage
   ☒ loss of use of property
   ☒ general damage
   ☐ loss of earning capacity
   ☒ other damage *(specify):*

   Compensatory Damages for Conversion, Civil Conspiracy to Commit Conversion, and Breach of Fiduciary Duty; Damages for Breach of Contract Exemplary and Punitive Damages

9. Relief sought in this complaint is within the jurisdiction of this court.

10. PLAINTIFF PRAYS

   For judgment for costs of suit; for such relief as is fair, just and equitable; and for

   ☒ compensatory damages
   ☐ **(Superior Court)** according to proof.
   ☐ **(Municipal and Justice Court)** in the amount of $
   ☒ other *(specify):*

   A. Damages for Conversion in sum of $150,000.00
   B. Damages for Civil Conspiracy to Commit Conversion in sum of $150,000.00
   C. Damages for Breach of Fiduciary Duty in sum of $150,000.00
   D. Damages for Breach of Contract in the sum of $40,000.00
   E. Exemplary Damages in sum of $1,500,000.00

11. The following causes of action are attached and the statements above apply to each: *(Each complaint must have one or more causes of action attached.)*
   ☐ Motor Vehicle
   ☐ General Negligence
   ☒ Intentional Tort
   ☐ Products Liability
   ☐ Premises Liability
   ☒ Other *(specify):* Conversion
   Conspiracy to Commit Conversion
   Breach of Fiduciary Duty
   Breach of Contract

JULIAN B. FENSTEN, A Professional Corporation
(Type or print name)

/s/ BRUCE GELBER
(Signature Of Plaintiff Or Attorney)
BRUCE GELBER

First CAUSE OF ACTION—Intentional Tort (Conversion)

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

CONV IT-1 Plaintiff *(name):* Kenneth Morgan Thomas

alleges that defendant *(name):* Kidder, Peabody & Co., Barclay Perry, James Johnston (Defendant Kidder, Peabody & Co. is herein referred to as defendant Kidder, Peabody.)

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on or about May, 1984 at *(place):* Los Angeles, California

CONV IT-2 *(description of reasons for liability):* At all times material herein, each defendant was acting in the course and scope of his employment for defendant, Kidder, Peabody. An oral agreement was made in October, 1982, between plaintiff and defendants Johnston, which agreement was supervised by defendant Perry on behalf of defendant Kidder, Peabody. Said agreement provided, in material part, that plaintiff would receive the account executive commissions on the sale of the core stock owned by any "insider" (including his family and related entities) who was introduced to defendant Kidder, Peabody by plaintiff.

CONV IT-3 Prior to May, 1984, plaintiff introduced Robert Call, an "insider", to defendant Kidder, Peabody. In connection with the sale of the said Robert Call's core stock in May, 1984, the account executive commission was worth $40,000.00. Plaintiff had a right of possession of said commission in the sum of $40,000.00 in accordance with the terms of the above-described agreement since plaintiff had introduced the said "insider" (Robert Call) to defendant Kidder-Peabody.

CONV IT-4 Defendants interfered with plaintiff's right of possession of said commission ($40,000.00) by wrongfully withholding said commission from plaintiff and by misdelivering the same to co-defendant Johnston.

CONV IT-5 Plaintiff's demand for the return of his said commission was refused by defendants.

1 ##

CONV IT-6 Paragraphs Ex-1, Ex-2, and Ex-3; BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC IT-1 through CC IT-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

Second CAUSE OF ACTION—Intentional Tort
(Civil Conspiracy)

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

CC IT-1 Plaintiff *(name):* Kenneth Morgan Thomas

alleges that defendant *(name):* Kidder, Peabody & Co., Barclay Perry, James Johnston (Defendant Kidder, Peabody & Co. is herein referred to as defendant Kidder, Peabody.)

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on or about May, 1984 at *(place):* Los Angeles, California

(description of reasons for liability):

CC IT-2 BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC-IT-1 through CC IT-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

CC IT-3 Prior to May, 1984, an unlawful agreement was made between defendants whereby defendant would interfere with and deprive plaintiff of possession of the account executive commissions he was entitled to (as specified herein in Paragraphs CONV IT-2 through CONV IT-4) in connection with the sale of the core stock owned by an "insider" (including his family and related entities) who was introduced to defendant Kidder, Peabody & Company by plaintiff.

CC IT-4 In May, 1984, plaintiff discovered that a $40,000.00 commission to which plaintiff was entitled had been misdelivered by defendants Kidder, Peabody and Perry to co-defendant Johnston. Plaintiff complained to defendants regarding said conduct; however defendants have refused to rectify this situation.

CC IT-5 As a result of defendants conduct, plaintiff has suffered damages in the sum of $40,000.00 and has incurred legal expenses in order to obtain relief.

CC IT-6 EX-1 through EX-3 are incorporated herein by this reference as though set forth in full.

Third CAUSE OF ACTION — Intentional Tort
(Breach of Fiduciary Duty)

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

FIDUC IT-1. Plaintiff *(name):* Kenneth Morgan Thomas

alleges that defendant *(name):* Kidder, Peabody & Co., Barclay Perry, James Johnson (Defendant Kidder & Peabody & Co., is herein referred to as defendant Kidder, Peabody.)

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on or about: May, 1984 at *(place):* Los Angeles, California

(*description of reasons for liability*):

FIDUC IT-2 Paragraphs Ex-1, Ex-2, and Ex-3; BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC IT-1 through CC T-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as through set forth in full herein.

FIDUC IT-3 That by administering and controlling the funds involved in the hereinbefore-described transactions, defendants agreed and promised that if core stock owned by Robert Call (plaintiff's referral) was sold, then the duty of defendants to pay to plaintiff his share of the commission would arise.

FIDUC IT-4 In March, 1984, after the sale of some of Mr. Call's core stock, plaintiff discovered that the account executive commission to which he was entitled had been misdelivered by defendants to co-defendant Johnston. When plaintiff complained, defendants rectified their conduct by re-directing to plaintiff his earned commission.

FIDUC IT-5 In May, 1984, plaintiff discovered that, once again, his earned commission in connection with the sale of the core stock of his referral, Robert Call, had been misdelivered by defendants to co-defendant Johnston. Defendants have chosen to ignore plaintiff's complaints in

this regard. Defendant Perry represented that plaintiff could receive his said commission in connection with said sale in May, 1984, only upon condition that plaintiff would remain in defendants' employment.

FIDUC IT-6 After defendant duty arose to deliver to plaintiff his said commission, the sum of money attributable to said commission was no longer the property of defendants but was held by said defendants for the sole benefit and use of plaintiff, thereby creating a fiduciary relationship between defendants and plaintiff.

FIDUC IT-7 Defendants breached their fiduciary duty to plaintiff by the acts or omissions set forth herein, particular those set forth in paragraphs FIDUC IT-4 through FIDUC IT-6.

FIDUC IT-8 Paragraphs EX-1 through EX-3 are incorporated by this reference as though set forth in full.

Fourth CAUSE OF ACTION — Breach of Contract

ATTACHMENT OF ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

BC-1 Plaintiff (*name*): Kenneth Morgan Thomas

alleges that on or about (*date*):
a ☐ written ☒ oral ☐ other (*specify*):
agreement was made between (*name parties to agreement*): Plaintiff Kenneth Morgan Thomas, Defendant Kidder, Peabody & Co., Defendant Barclay Perry, Defendant James Johnston
☐ A copy of the agreement is attached as Exhibit A, or
☒ The essential terms of the agreement ☐ are stated in Attachment BC-1 ☒ are as follows (*specify*):

In Exchange for introducing "insiders" (valuable clientele) to defendant Kidder, Peabody, plaintiff was entitled to immediate possession of the account executive commission on the sale of the core stock owned by said "insider" (including his family and related entities).

BC-2 On or about (*dates*): May, 1984
defendant breached the ageement by ☐ the acts specified in Attachment BC-2 ☒ the following acts (*specify*):

Defendants wrongfully withheld from plaintiff the account executive's portion of the commission (worth $40,000.00) on the sale of core stock of an "insider" (Robert Call) who had been introduced to defendant Kidder, Peabody by plaintiff; instead, the said commission was misdelivered to co-defendant Johnston.

BC-3 Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4 Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement
☐ as stated in Attachement BC-4 ☒ as follows *(specify):*

Damages in the sum of $40,000.00 for breach of contract.

BC-5 ☐ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of $
☐ according to proof.

BC-6 ☒ Other: CONV IT-1 through CONV IT-5 are incorporated by this reference as though set forth in full herein.

EXEMPLARY DAMAGES ATTACHMENT

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

EX-1 As additional damages against defendant (*name*):
Kidder, Peabody & Co., Barclay Perry, James Johnston

Plaintiff alleges defendant was guilty of
☒ malice
☐ fraud
☒ oppression
as defined in Civil Code section 3294, and plaintiff should recover, in addition to actual damages, damages to make an example of and to punish defendant.

EX-2 The facts supporting plaintiff's claim are as follows:
Paragraphs BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC IT-1 through CC IT-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

Said facts clearly reveal that defendants acted with conscious disregard for the rights of plaintiff, that defendants wrongfully converting plaintiff's earned commission to the possession of a co-defendant, and that defendants conduct was outrageous in view of the special trust and confidence inherent in the relationship between the parties.

Case No. C 529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

vs.

KIDDER PEABODY & CO., BARCLAY PERRY,
JAMES JOHNSTON,
Defendants.

(1) Notice of Hearing on Motion and Petition; (2) Motion for Order Staying Proceedings; (3) Petition for Order Compelling Arbitration; (4) Memorandum of Points and Authorities.

Date: March 11, 1985
Time: 9:00 A.M.
Dept: 81

Original Filed: Feb. 22, 1985 County Clerk

TO PLAINTIFF KENNETH MORGAN THOMAS AND TO HIS COUNSEL OF RECORD HEREIN JULIAN FENSTEN AND BRUCE GELBER:

PLEASE TAKE NOTICE that on Monday, March 11, 1985, at 9:00 a.m., or as soon thereafter as counsel may be heard in Department 81 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston will move the Court for an Order staying proceedings in the above-entitled action. Further, defendants Barclay Perry and James Johnston

will petition the Court for an Order compelling arbitration of the claims asserted in plaintiff's Complaint herein.

Said Motion and Petition will be based on the grounds that plaintiff Kenneth Morgan Thomas ("plaintiff") entered into a written agreement to arbitrate any controversy arising out of his employment with Kidder Peabody, or the termination thereof, pursuant to the Rules of the Board of Governors of the New York Stock Exchange, Inc., and that the matters complained of in the Complaint constitute controversies subject to arbitration under said agreement and under the laws of the United States.

Said Motion and Petition will be based upon the provisions of 9 U.S.C. §§ 2, 3 and 4 and California Code of Civil Procedure §§ 1281, 1281.2, and 1281.4; this Notice; the Memorandum of Points and Authorities annexed hereto; all the pleadings, records and papers on file in the above-entitled action; and such oral and documentary evidence as may be presented at the hearing on said Motion and Petition.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON
Attorneys for Defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston

MOTION FOR ORDER STAYING PROCEEDINGS

Pursuant to the provisions of 9 U.S.C. §§ 2 and 3 and California Code of Civil Procedure § 1281.4, defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston hereby move this Court for an Order Staying Proceedings in this action until arbitration is had of the clains which are the subject of the Complaint herein, and an award made by the arbitrators, or, alternatively, the United States District Court finds that arbitration is not appropriate.

This Motion is additionally based on the annexed Petition for Order Compelling Arbitration.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON

Attorneys for Defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston

PETITION FOR ORDER COMPELLING ARBITRATION

Defendants Barclay Perry and James Johnston hereby petition this Court for an Order Compelling Arbitration of the claims which are asserted in, and which are the subject of, plaintiff's Complaint, in accordance with the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc.

This Petition is based on the grounds that a written agreement, attached hereto as Exhibit A, to arbitrate controversies that arise out of plaintiff's employment with Kidder Peabody or the termination thereof, exists between the parties, the matters set forth in the Complaint constitute such a controversy, and plaintiff has failed and refused to arbitrate said controversy.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON

Attorneys for Defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION AND PETITION

1. Plaintiff Has Entered Into A Written Agreement To Arbitrate The Claims Asserted In The Complaint.

On or about August 16, 1982, plaintiff Kenneth Morgan Thomas ("plaintiff") sought employment with Kidder, Peabody & Co. Incorporated ("Kidder, Peabody"). Kidder Peabody is a registered broker/dealer of securities and a member firm of the New York Stock Exchange, Inc. ("N.Y.S.E."). Thomas sought employment as a registered representative and as an officer of the firm.

In connection with his employment Thomas completed and executed a Uniform Application for Securities Industry Registration (Form U-4), a copy of which is attached hereto as Exhibit A, Form U-4, which was filed with the N.Y.S.E. on September 14, 1982. Form U-4 provides, at paragraph 5 thereof, that:

> "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register. . ."

Among the organizations with which Thomas registered was the N.Y.S.E. Rule 347 of the N.Y.S.E., attached hereto as Exhibit B, provides that:

> "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization *shall be settled by arbitration, at the instance of any party, in accordance with the arbitration procedure prescribed in these Rules.*" [Emphasis supplied].

The Rules of the N.Y.S.E. pertaining to arbitration are attached hereto as Exhibit C.

As appears more fully in the Complaint herein, Thomas' claims deal with controversies arising out of his employment at Kidder, Peabody and his compensation therefor. They are thus subject to arbitration pursuant to Rule 347 of the N.Y.S.E. and Form U-4.

2. Procedural Status Of This Case

This action was filed January 4, 1985. Although service of process was defective, defendants filed their Answer on February 13, 1985. Defendants thereafter made demand upon Thomas for arbitration of his claims herein, which demand was not timely acceded to by Thomas. A copy of the demand letter is attached hereto as Exhibit D. Accordingly, defendant Kidder, Peabody had filed a petition in the United States District Court for the Central District of California entitled *Kidder, Peabody & Co. Incorporated v. Kenneth Morgan Thomas* seeking an order of the United States District Court, pursuant 9 U.S.C. §§ 2, 3, and 4, that the arbitration agreement between the parties be given effect, and the proceedings before this Court stayed. Thomas has yet to respond to that Petition.

Defendants are now before this Court seeking the following relief:

(1) All defendants seek a stay of this proceding pending arbitration, or, in the alternative, a determination by the United States District Court that arbitration is not appropriate;

(2) Defendants Barclay Perry and James Johnston seek an order of this court to compel arbitration of the claims herein as brought against them.

3. The Court Must Order Arbitration In Accordance With The Written Agreements And Must Stay These Proceedings Pending Arbitration.

Plaintiff has entered into a written agreement to arbitrate controversies. Accordingly, whether the agreements are viewed under controlling federal law, or the law of the State of California, this Court must stay the proceedings before it and order arbitration of plaintiff's claims pursuant to the rules of the N.Y.S.E.

A. *Federal Law.*

The United States Arbitration Act, 9 U.S.C. §§ 1-14, provides that the agreement between plaintiff and Kidder Peabody herein must be given effect and require that this court's proceeding be stayed pending arbitration of plaintiff's claims.

Section 2 of the Act, 9 U.S.C. § 2, provides that:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be *valid, irrevocable,* and *enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract." [Emphasis added.]

The United States Supreme Court has recently recognized that:

> "Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. . . .* The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

Moses H. Cone Hospital v. Mercury Construction Corporation, 460 U.S. 1, 74 L.Ed.2d 765, 785, 103 S.Ct. 927 (1983) [Emphasis added].

The United States Supreme Court has further held that:

> "The Arbitration Act . . . creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. . . . [*E*]*nforcement of the Act is left in large part to the state courts. . . .*"

Id. at page 786, note 32 [Emphasis added].

Here, the arbitration clause in question is written and appears in a contract evidencing transactions involving interstate commerce, *i.e.,* securities transactions. Thus, the agreements to arbitrate are, pursuant to 9 U.S.C. § 2, valid, irrevocable, and enforceable.

Numerous federal courts have carefully considered the applicability and enforceability of Rule 347, and they have uniformly concluded that the N.Y.S.E. Constitution and Rules constitute binding agreements between member firms and their registered representatives creating a legal obligation on the part of both parties to arbitrate. *See, Muh v. Newberger Loeb & Co.,* 540 F.2d 970, 937 (9th Cir. 1976); *Coenen v. W.R. Pressprich & Co.,* 453 F.2d 1209, 1211 (2d Cir.), *cert. denied,* 406 U.S. 949 (1972); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Hovey,* 726 F.2d

1286 (8th Cir. 1984); *Downing v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 725 F.2d 192 (2d Cir. 1984).

Since the agreements are valid, this Court is *required, as a matter of substantive federal law,* to compel arbitration of plaintiff's claims and stay the proceedings herein pursuant to 9 U.S.C. §§ 3 and 4. Section 4 provides that upon receiving a petition to compel arbitration:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the Court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

9 U.S.C. § 4 [Emphasis added.] *See also, Southland Corporation v. Keating,* ____ U.S. ____, 104 S. Ct. 852, 79 L. Ed. 2d 1, 12-13 (1984).

Further, 9 U.S.C. § 3 provides that:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under the agreement, *shall,* on application of one of the parties, *stay the trial* of the action until such arbitration has been had in accordance with the terms and agreement. . ."

9 U.S.C. § 3 [Emphasis added.]

Here, the arbitration agreements are broadly worded to require arbitration of *any* controversy between a registered representative such as plaintiff and Kidder Peabody arising out of plaintiff's employment, or the

termination thereof, by Kidder Peabody. Accordingly, the claims are referable to arbitration, and, pursuant to 9 U.S.C. § 3, this Court *must* stay the proceedings before it.

B. *California Law.*

A similar result would be reached were California law applicable.

Section 1281 of the California Code of Civil Procedure ("CCP") provides that:

> "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is *valid, enforceable* and *irrevocable,* save upon such grounds as exist for the revocation of any contract." [Emphasis added.]

Consistent with § 1281, California courts have long favored arbitration proceedings to effect the summary disposition of controversies. *Lewsadder v. Mitchum, Jones & Templeton, Inc.,* 36 Cal.App.3d 255, 259, 111 Cal.Rptr. 405 (1973); *Parr v. Superior Court,* 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983). As stated by the court in *Vernon v. Drexel Burnham & Co.,* 52 Cal.App.3d 706, 716, 125 Cal.Rptr. 147 (1975):

> "[T]here is perhaps no higher public policy than to uphold and give effect to contracts validly entered into and legally permissible in subject matter."

In furtherance of the policy favoring arbitration, CCP § 1281.2 *requires* a court to order arbitration under such circumstances as are present in this case, in that it provides:

> "On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto

> refuses to arbitrate such controversy, *the court shall order the petitioner and the respondent to arbitrate the controversy* if it determines that an agreement to arbitrate the controversy exists. . ." [Emphasis added.]

Under this provision,

> "the court's jurisdiction is limited to making two determinations: first, that an agreement to arbitrate the controversy exists, and second, that one party refuses to arbitrate."

Office and Professional Employees Union, Local 29 v. Sea-Land Service, Inc., 90 Cal.App.3d 844, 847, 153 Cal.Rptr. 621 (1979).

Form U-4 pertains specifically to plaintiff's employment at Kidder Peabody and the termination thereof. The agreement, as extracted above, is broadly written to require arbitration of *any* controversy arising out of that employment. Accordingly, arbitration must be ordered pursuant to CCP § 1281.4, and the proceedings before this Court must also be stayed, as the statute expressly provides that "if a court . . . has ordered arbitration of a controversy, [it] . . . *shall*, upon motion of a party to such action or proceeding, stay the action or proceeding until arbitration has been had in accordance with the order to arbitrate . . . ." [Emphasis added.] *See also, Parr v. Superior Court*, 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983); *Ericksen v. 100 Oak Street*, 35 Cal. 3d 312, 323, 197 Cal.Rptr. 581, 587, 673 P.2d 251, 257 (1983).

In view of the strong policy enunicated by the United States, and California through the enactment of the aforementioned statutory provisions respecting arbitration of controversies, and in view of the existence of the arbitration agreement between the parties, it is clear that

arbitration of this matter should be compelled and proceedings before this Court stayed.

4. The Arbitration Agreement Entered Into By Plaintiff Applies To His Claims Against Defendants Perry and Johnston.

The Complaint, at page 4 (Conv. IT-2), alleges that Perry and Johnston, in doing the acts alleged, were acting within the course and scope of their employment with defendant Kidder Peabody. Accordingly, the agreement which plaintiff entered into embraces the acts of Kidder Peabody's agents and employees (including Perry and Johnston) since Kidder Peabody, as a corporation, cannot act otherwise than through and by such agents and employees. This rule was expressly and unequivocably articulated by the Court of Appeal in *Berman v. Dean Witter & Co., Inc.*, 444 Cal.App.3d 999, 1004, 119 Cal.Rptr. 130 (1975). That case involved an arbitration provision in a customer's agreement which is similar to the agreement in this action. Accordingly, the fact that Perry and Johnston are not signatories to the Agreement does not exclude or separate them, as alleged agents and employees of Kidder Peabody, from the benefit of arbitration.

5. Conclusion

Plaintiff executed a written agreement in which he expressly and unequivocally agreed to arbitrate. The Complaint alleges claims which fall within the class of controversies covered by said agreement. Perry and Johnston are entitled to the benefit of arbitration. It is therefore respectfully urged that plaintiff be ordered to submit his claims to arbitration pursuant to the rules of the NYSE, and that, pending the completion of said arbitration, or a ruling of the District Court that arbitration is

not appropriate, the proceedings before this Court be stayed.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: /s/ MAREN E. NELSON
Attorneys for Defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston

(Exhibits omitted.)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 3, 1986, I served the within JURISDICTIONAL STATEMENT in re: "Barclay Perry and James Johnston vs. Kenneth Morgan Thomas" in the United States Supreme Court, October Term 1986, No. .....

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Julian B. Fensten
A Professional Corporation
700 South Flower St., 22nd Floor
Los Angeles, CA 90017
Counsel for Appellee

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 3, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Subscribed and Sworn to before me this 3rd day of October, 1986.

My Commission Expires 10/27/86.

June A Mason

Notary Public

OFFICIAL SEAL
JUNE A. MASON
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Oct. 27, 1986

MOTION

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-566

In the Supreme Court of the United States

October Term, 1986

BARCLAY PERRY and JAMES JOHNSTON,

Appellants,

v.

KENNETH MORGAN THOMAS,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FIVE

MOTION TO DISMISS OR AFFIRM

BRUCE GELBER
Counsel of Record
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Attorneys for Appellee
KENNETH MORGAN THOMAS

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED

1. The question presented by this motion to dismiss is whether appellants BARCLAY PERRY and JAMES JOHNSTON lack standing to bring this appeal since

(a) No agreement exists between appellants and appellee to arbitrate any disputes as between these parties;

(b) BARCLAY PERRY and JAMES JOHNSTON were not parties to the purported arbitration agreement between appellee and KIDDER, PEABODY & CO., INC. (appellants' co-defendant in the underlying civil action), upon which these appellants now rely;

(c) KIDDER, PEABODY & CO., INC., from whom these appellants allegedly derive their standing to compel arbitration, did not join in appellants' motion to compel arbitration in the State court below; and

(d) KIDDER, PEABODY & CO., INC. did not join in this appeal but, instead, filed a separate motion to compel arbitration in the United States District Court for the Central District of California, which matter is now pending before the United States Court of Appeals for the Ninth Circuit.

2. The question presented by this motion to affirm is whether the Court of Appeal of the State of California, Second Appellate District, Division Five, correctly ruled that

(a) The controlling authority is *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), a unanimous 8-0 decision by this Court which upheld the validity of California

Labor Code §229, which statute provides that civil actions to collect wages in said State may be pursued without regard to the existence of any private agreement to arbitrate, and

(b) The wage claim under California *Labor Code* §229 is not severable from the tort claims, and thus the tort claims are not arbitrable, since they merely constitute different remedies for the same underlying denial of wages.

PARTIES TO PROCEEDINGS BELOW

Parties before the Court of Appeal of the State of California, Second Appellate District, Division 5:

(1) Barclay Perry and James Johnston, appellants herein; and

(2) Kenneth Morgan Thomas, appellee herein.

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In the Supreme Court of the United States

October Term, 1986

BARCLAY PERRY and JAMES JOHNSTON,

Appellants,

v.

KENNETH MORGAN THOMAS,

Appellee.

MOTION TO DISMISS OR AFFIRM

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee KENNETH MORGAN THOMAS moves to dismiss the appeal herein, or in the alternative, to affirm the decision of the Court of Appeal of the State of California, Second Appellate District, Division Five, on the grounds that (1) these Appellants lack standing to bring this appeal and (2) it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT OF FACTS

Appellants' Statement of the Case needs to be supplemented in several respects.

First, the purported arbitration agreement which appellants now seek to enforce concerns only appellee and KIDDER, PEABODY & CO., INC., an entity which is not a party to the matter now before this Court. In August, 1982 at the time of entering his employment with KIDDER, PEABODY & CO., INC., appellee did sign a Form U-4. However, said Form U-4 only purports to be an agreement between appellee and KIDDER, PEABODY & CO., INC.

In particular, the arbitration provision in Form U-4 provides, at paragraph 5, that:

> "I agree to arbitrate any dispute . . . *that is required* to be arbitrated under the rules, constitutions or by-laws of the organizations with which I am registered. . . ."

The subject-organization is the New York Stock Exchange, Inc. ("N.Y.S.E."). The rule at issue is Rule 347 of the N.Y.S.E. The purported arbitration agreement, therefore, would only require arbitration of disputes covered by Rule 347. Rule 347, by its express language, only requires arbitration of controversies between registered representatives and their member or member organizations. Appellants are not, nor do they claim to be, member or member organizations. Rule 347 has no application to a civil action for conversion brought by a registered representative against some entity other than a member or member organization.

While Rule 347 would have some relevance to a dispute between appellee and KIDDER, PEABODY & CO., INC., the latter is not a party to this proceeding. In fact, the

motion to compel arbitration of the dispute between appellee and KIDDER, PEABODY & CO., INC. is not even before this Court. KIDDER, PEABODY & CO., INC. did not join in appellants' motion to compel arbitration in the California Superior Court; nor did KIDDER, PEABODY & CO., INC. join in appellants' appeal to the California Court of Appeal; nor did KIDDER, PEABODY & CO., INC. join in Appellants' petition for hearing in the California Supreme Court; and KIDDER, PEABODY & CO., INC. is not a party to this appeal.

KIDDER, PEABODY & CO., INC. separately filed the identical motion to compel arbitration in the United States District Court for the Central District of California, where the motion was denied. KIDDER, PEABODY & CO., INC. then duplicated the State appellate proceedings by filing an appeal with the United States Court of Appeals for the Ninth Circuit, where the matter is now pending.[1]

As to the merits of appellants' motion, the California Court of Appeal below ruled that this Court's unanimous, 8-0 ruling in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973), was still a vital case and still binding, citing, *inter alia, Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375 (1983). The Court of Appeal below stated that it concurred with the trial court's conclusion that appellee THOMAS has brought a suit for the recovery of wages under several theories, and that the wage claims are not severable from the tort claims.

---

[1]No reasonable explanation has yet been offered by appellants for this total duplication of proceedings in the State and Federal Court systems whereby KIDDER, PEABODY & CO., INC., an indispensable party, is not a party to the proceedings now before this Court.

ARGUMENT

I.

BARCLAY PERRY AND JAMES JOHNSTON LACK STANDING TO BRING THIS APPEAL SINCE THEY WERE NOT PARTIES TO THE PURPORTED ARBITRATION AGREEMENT UPON WHICH THEY RELY, AND THE ENTITY THROUGH WHOM THEY DERIVE THEIR ALLEGED STANDING (KIDDER, PEABODY & CO., INC.) IS NOT A PARTY TO THIS APPEAL.

It is a well-established principle of law that a party cannot be compelled to arbitrate a dispute to which he has not agreed to submit. *United Steel Workers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960).

The purported agreement to arbitrate only pertains to disputes between appellee THOMAS and KIDDER, PEABODY & CO., INC. The Form U-4, upon which appellants rely, concerns only the arbitration of disputes that are *required* to be arbitrated under the rules of the particular organization involved, i.e., the N.Y.S.E. Rule 347 provides only for the forced arbitration of disputes between a registered representative (appellee) and a member or member organization of the N.Y.S.E. Appellants PERRY and JOHNSTON are not, nor do they claim to be, member or member organizations of the N.Y.S.E. Thus, Rule 347 has no application to these appellants.

By the dubious tactic of filing duplicate motions in both the State court and the Federal court, and thereby doubling the amount of paperwork and the number of judicial hearings, *KIDDER, PEABODY & CO., INC. is not a party to this appeal.* KIDDER, PEABODY & CO., INC., from whom these appellants allegedly derive their standing to compel arbitration, did not join in appellants' motion to compel arbitration in the State court below; nor did KIDDER, PEABODY & COMPANY., INC. join in the appeal now before this Court; instead, KIDDER, PEABODY & CO., INC. has filed a separate motion to compel arbitration which is now pending before the United States Court of Appeal for the Ninth Circuit, on appeal from the United States District Court for the Central District of California.

These appellants simply lack standing to bring this appeal. Any interest which these appellants might have possessed in enforcing the purported arbitration agreement evaporated when KIDDER, PEABODY & CO., INC., chose not to be a party to the State court proceedings and, instead, filed a duplicate motion to compel arbitration in the U.S. District Court. KIDDER, PEABODY & CO., INC. is thus an indispensable party to this appeal, and this appeal should be dismissed for lack of standing on the part of these appellants.[2]

---

[2]The issue of standing is never waived and is a prerequisite to judicial review. In *Juidice v. Vail,* 430 U.S. 327, 331-32 (1977), this Court ruled:

> "Although raised by neither of the parties, we are first obliged to examine the standing of appellees as a matter of the case-or-controversy requirement associated with Art. III [of the United States Constitution] . . ."

II.

THE SUPREME COURT OF THE UNITED STATES HAS RULED UNANIMOUSLY THAT A CIVIL ACTION IN CALIFORNIA FOR WRONGFUL DENIAL OF WAGES IS NOT SUBJECT TO COMPULSORY ARBITRATION, NOTWITHSTANDING A PURPORTED ARBITRATION AGREEMENT BETWEEN THE PARTIES.

In bringing this appeal, appellants are asking this Court to overrule the unanimous, 8-0 decision of the United States Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, U.S. 117 (1973) (hereinafter "*Ware*"). If ever a case was controlled by the principle of *stare decisis*, it is the pending matter. The facts and issues of the *Ware* case arose in a factual setting which is virtually identical with the present action: (a) the plaintiffs in both actions had been account executives employed in the California office of a member-corporation of the New York Stock Exchange; (b) civil actions had been filed for the wrongful denial of wages due and owing to each plaintiff; and (c) in both cases, defendants asserted that the boiler-plate provision in an application form, which plaintiffs had been required to sign as a condition of employment in advance of any dispute, effectively barred the aggrieved employee from access to the civil courts for relief. In *Ware*, this Court squarely framed the issue as follows:

> "Specifically, we are concerned with the questions (a) *whether, in the context of the present case, §229 of the California Labor Code, which would preclude compulsory arbitration of wage disputes, is ineffective under the Supremacy Clause . .* "

Under virtually identical circumstances, the validity of *Labor Code* §229 was tested before this Supreme Court in *Ware*, and this Court unanimously ruled that *the State's interest in protecting wage earners prevailed over the Federal interest in creating uniformity in dispute resolution in the brokerage industry. See Ware,* 414 U.S. at 135-140. This Court has already performed the balancing of the conflicting State and Federal interests involved in this appeal.

After careful scrutiny of the competing interests involved, this Court concluded:

> "In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting this employment relationship. The policy prevails in the absence of interference with the federal regulatory scheme. *We find no such interference . . .*"

Ware, 414 U.S. at 139-40 [emphasis added].

The unanimous ruling in *Ware* was underpinned by this Court's consideration of the legislative history of the statutes involved. With regard to the legislative history behind *Labor Code* §229, this Court observed:

> "By the addition of §229 to its Labor Code in 1959 California codified for the wage earner, with the solitary-collective-bargaining agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate . . . *This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign*

> *away in advance his right to resort to the judicial system for redress of any employment grievance."*

Ware, 414 U.S. at 130-31 [emphasis added].

It has been but thirteen years since this Court's unanimous ruling was handed down in *Ware*. In the short period of time that has passed, the paramount importance of the State's concern with protecting and safeguarding the rights of wage earners against unscrupulous employment practices has markedly grown in stature. See *Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir. 1982).

The only distinction between *Ware* and the present case is a *procedural* one. In *Ware*, the motion to compel arbitration was brought in the California Superior Court pursuant to the State Arbitration Act (California *Code of Civil Procedure* §1281, *et seq.*). In the case at bar, the motion was brought in the California Superior Court pursuant to the Federal Arbitration Act (9 U.S.C. §1, *et seq.*). At the time of *Ware*, the Federal Arbitration Act was in full force and effect. The legislative intent underlying the Federal Arbitration Act was in effect at the time of *Ware* and does not change with the passage of time. Since the Federal Arbitration Act is a matter of substantive law, its application, if any, was available to this Court and the litigants in *Ware* without regard to whether the motion was procedurally brought under the State Act or the Federal Act. In short, appellants have raised a distinction without a difference; and, in view of the implicit re-affirmance of *Ware* in subsequent cases (see *Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 389 (1983)), *Ware* is the controlling authority.

Defendants rely on the cases of *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (hereinafter "*Southland*") and *Dean, Witter, Reynolds, Inc. v. Byrd*, ___ U.S. ___, 105 S.Ct. 1238 (1985) (hereinafter "*Byrd*"). Neither of these cases expressly overrule *Ware*, nor implicitly overrule *Ware*, nor even purport to overrule *Ware*.

It may be suggested that *Ware* does not apply because it deals with alleged pre-emption under the Securities Exchange Act rather than the Federal Arbitration Act. This is too narrow a view. The *Ware* analysis begins with the statement that "the broad issue thus presented to us is the extent to which a federal regulatory statute pre-empts state law." 414 U.S. at 125. It should be noted that this Court in *Ware* had the Federal Arbitration Act well in mind, referring to it in note 15. 414 U.S. at 135.

If there is a stronger policy underlying the Federal Arbitration Act, as opposed to the Securities Exchange Act, BARCLAY PERRY and JAMES JOHNSTON have certainly not identified that policy. Indeed, the policies appear to be the same insofar as arbitration agreements are concerned.

Appellants' reliance on *Bayma v. Smith, Barney, Harris, & Upham*, 784 F.2d 1025 (9th Cir. 1986), is misplaced. That ruling does not concern itself with the controlling authority of *Ware* and California *Labor Code* §229.

Southland and *Ware* are consistent with each other. *Ware* holds that arbitration agreements between securities brokers and registered representatives are subject to *Labor Code* §229, notwithstanding stock exchange rules promulgated pursuant to §6 of the Securities Exchange Act. *Southland*, on the other hand, deals with the California Franchise Investment Law.

Ware applies to the factual situation in the instant case; *Southland* simply does not.

Thus *Ware*, upholding the validity of *Labor Code* §229, is the controlling authority.

As the Court of Appeal correctly held, appellee's wage claim is not severable from his tort claims, and the latter are not arbitrable under *Byrd*. Appellee THOMAS is simply seeking different remedies for the same underlying event (wrongful denial of wages).

To the extent that appellants' action concerned the denial of wages, the matter is covered by *Ware* and *Labor Code* §229.

To the extent that the actions of appellants PERRY and JOHNSTON do not concern "wages", as appellants so argue, their actions do not "arise" out of the employment and therefore would not be covered by the purported arbitration agreement.

As a further note, the ruling in *Byrd* concerned "district courts" and "pendent claims", neither of which would apply in the State court proceedings below. A duplicate proceeding in this matter is now pending before the U.S. Court of Appeals for the Ninth Circuit, where the issues of "pendent claims" would have some meaning (but would not be applicable for the same reasons set forth herein). While the opinion in *Byrd* did not indicate the rationale for limiting the ruling to district courts and pendent claims, it is likewise not clear why appellants and KIDDER, PEABODY & CO., INC. would be litigating the identical motion to compel arbitration in both the State courts and the Federal courts.

CONCLUSION

WHEREFORE, appellee respectfully submits that appellants lack standing to bring this appeal, and that

the question upon which this appeal depends is so unsubstantial as not to require further argument, and appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Court of Appeal of the State of California.

Dated: November 3, 1986

Respectfully submitted,

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Attorneys for Appellee
KENNETH MORGAN THOMAS

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 3, 1986, I served the within *Motion to Dismiss or Affirm* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Peter Brown Dolan
Maren E. Nelson
Lisa A. Popovich
Overton, Lyman & Prince
550 South Flower Street
Sixth Floor
Los Angeles, California 90071
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 3, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

REPLY BRIEF

NOV 26 PAGE 4

Supreme Court, U.S.
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No. 86-566

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,
Appellants,

vs.

KENNETH MORGAN THOMAS,
Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Five

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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November 13, 1986

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No. 86-566

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,
Appellants,

VS.

KENNETH MORGAN THOMAS,
Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Five

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I

APPELLANTS ARE ENTITLED TO THE BENEFIT OF THE ARBITRATION AGREEMENT

Appellee does not deny that an agreement to arbitrate exists between himself and Kidder, Peabody & Co. Incorporated ("Kidder, Peabody"). Instead, without citation to any authority, he argues that appellants, the employees of Kidder, Peabody, do not have "standing" to pursue this appeal because they are not signatories to the arbitration agreement.

This rather unique argument was raised for the first time on appeal before the California Court of Appeal, and

was rejected by that Court because it was not raised at the trial court level. Appendix to Jurisdictional Statement at page 4a, n.1.

Further, the argument understandably lacks citation because the law is plainly otherwise. The Complaint alleges that appellants, in doing all the acts alleged, were acting within the course and scope of their employment for Kidder, Peabody. Appendix to Jurisdictional Statement at page 40a. The agreement which appellee entered into embraces the acts of Kidder, Peabody's agents and employees, including appellants, since Kidder, Peabody, as a corporation, cannot act otherwise than by and through such agents and employees. As such, appellants are entitled to the benefit of arbitration, as is their principal. *Ross v. Mathis*, 624 F.Supp. 110 (N.D. Ga. 1985); *Berman v. Dean Witter & Co., Inc.*, 44 Cal.App.3d 999, 1004, 119 Cal.Rptr. 130, 133 (1975); *Restatement, 2nd, Agency* §§ 327-334.

Appellee's reliance on *Juidice v. Vail*, 430 U.S. 327, 331-332, 97 S.Ct. 1211, 1215, 51 L.Ed.2d 376 (1977) is misplaced. In that case the question was whether the appealing party was involved in an actual "case or controversy" as a predicate to jurisdiction in this Court. There is no question but that this Court has jurisdiction over this appeal, and that an actual controversy exists herein. *See Southland Corp. v. Keating,* 465 U.S. at 6-7, 104 S.Ct. at 856-857, 79 L.Ed.2d at 9-10 (1984).

II

CALIFORNIA LABOR CODE § 229 HAS BEEN PREEMPTED BY THE FEDERAL ARBITRATION ACT

Contrary to appellee's assertions, appellants do not ask this Court to overrule *Ware,* nor do they contend that *Ware* is inapplicable because Ware's the arbitration petition therein was made under California Code of Civil Procedure § 1281.1. Rather, appellants' position is simply that *Ware* stands for the limited proposition that Labor Code § 229 was not preempted by the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78111 ("34 Act"), as that Act stood in 1973.

The decisions of this Court make it abundantly clear that the federal Arbitration Act, 9 U.S.C. §§ 1-14, preempts *any* attempt by a state to place areas of dispute beyond the reach of arbitration agreements, as the California legislature attempted to do by the enactment of Labor Code § 229. *See Moses H. Cone Memorial Hospital v. Mercury Construction Co.,* 460 U.S. 1, 24, 103 S.Ct. 927, 947, 74 L.Ed.2d 765, 785 (1983); *Southland Corporation v. Keating,* 465 U.S. 1, 17, n. 11, 104 S.Ct. 852, 861, n. 11, 79 L.Ed.2d 1, 16, n. 11 (1984). Moreover, reliance on *Ware* is misplaced because it only decided the extent to which a federal regulatory statute, the '34 Act, preempted state law, the California Labor Code. *Ware* did not decide that Labor Code § 229 was superior to, or exempt from, the Federal Arbitration Act. Furthermore, the '34 Act has since been amended by Congress to expand its preemptive reach.

III

CONCLUSION

No reason cognizable under Supreme Court Rule 16 has been presented by appellee as grounds for either dismissing this appeal or affirming the lower court's ruling. Accordingly, for the foregoing reasons, together with those set forth in appellants' Jurisdictional Statement, the Court ought note probable jurisdiction, and set this matter for oral argument.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 13, 1986, I served the within Brief in Opposition to Motion to Dismiss or Affirm in re: "Barclay Perry and Kenneth Morgan Thomas" in the United States Supreme Court, October Term 1986, No. 86-566; on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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A Professional Corporation
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Los Angeles, California 90017

All Parties required to be Served have been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 13, 1986, at Los Angeles, California

Timothy M. Sill

TIMOTHY M. SILL

JOINT

APPENDIX

Supreme Court, U.S.
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NO. 86-566

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,
Appellants,

VS.

KENNETH MORGAN THOMAS,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FIVE

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 7, 1986

PROBABLE JURISDICTION NOTED
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Further Response to District Court's Request for Status of State Court Proceedings, filed April 29, 1985 ..... 236a

Notice of Appeal, filed May 24, 1985 ..... 240a

UNITED STATES COURT OF APPEALS, NINTH JUDICIAL CIRCUIT:

Order Requiring District Court to Clarify the Ground or Grounds Upon Which It Granted Appellee Thomas' Motion to Dismiss, filed September 22, 1986 ..... 244a

Order of the District Court, clarifying its April 25, 1985 Order, filed September 30, 1986 ..... 245a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Proceedings Before the Superior Court of the State of California, County of Los Angeles:

January 4, 1985	Plaintiff Thomas' Complaint for Conversion, Conspiracy to Commit Conversion, Breach of Fiduciary Duty, Breach of Contract, and Exemplary and Punitive Damages filed.
February 13, 1985	Answer of Defendant Kidder, Peabody & Co. Incorporated, Barclay Perry and James Johnston filed.
February 22, 1985	Defendants Kidder, Peabody & Co. Incorporated, Barclay Perry and James Johnston's Petition for Order Compelling Arbitration filed.
March 29, 1985	Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Petition to Compel Arbitration filed.
March 29, 1985	Declaration of Kenneth Morgan Thomas in Opposition to Defendants' Motion to Compel Arbitration filed.
April 3, 1985	Defendants' Reply Memorandum in Support of Petition to Compel Arbitration filed.
April 10, 1985	Order Denying Motion of Defendants for Order Staying Proceedings and Order Compelling Arbitration entered.

April 15, 1985	Notice of Ruling Re Defendants' Motion for Order Staying Proceedings and for Order Compelling Arbitration filed.
April 16, 1985	Request for Statement of Decision filed by Defendants.
April 19, 1985	Objection to Defendants' Request for Statement of Decision filed.
April 23, 1985	Reply by Defendants to Objection (by Plaintiff) to Defendants' Request for Statement of Decision filed.
April 23, 1985	Proposed Statement of Decision issued.
April 26, 1985	Response to Defendants' Reply to Objection by Plaintiff to Request for Statement of Decision filed.
May 14, 1985	Order adopting Proposed Statement as Statement of Decision of Court entered.
May 31, 1985	Defendants' Notice of Appeal to Court of Appeal, State of California, filed.

Proceedings Before the Court of Appeal of the State of California Second Appellate District, Division Five:

October 15, 1985	Appellants' Opening Brief filed.
November 14, 1985	Respondents' Opening Brief filed.
December 4, 1985	Appellants' Reply Brief filed.
April 10, 1986	Opinion and Judgment of Court of Appeal of the State of California, Second Appellate District, Division Five, affirming Judgment of Trial Court, filed.
April 25, 1986	Appellants' Petition for Rehearing filed.
May 5, 1986	Respondents' Answer to Petition for Rehearing filed.
May 6, 1986	Order Denying Petition for Rehearing entered.

Proceedings Before the Supreme Court of the State of California:

May 20, 1986	Appellants' Petition for Review of the Decision of the Court of Appeal filed.
June 9, 1986	Respondents' Answer to Petition for Review filed.
June 19, 1986	Appellants' Reply to Answer to Petition for Review filed.
July 10, 1986	Appellants' Petition for Review Denied.
July 22, 1986	Remittitur Notice given.

Proceedings Before the United States District Court, Central District of California:

February 22, 1985	Kidder, Peabody & Co. Incorporated's Petition to Compel Arbitration filed.
March 15, 1985	Kidder, Peabody & Co. Incorporated's Notice Of Hearing on Motion and Petition, Motion for Order Compelling Arbitration and for Order Staying Proceedings filed.
March 25, 1985	Respondent Thomas' Answer to Petition to Compel Arbitration; Opposition to Motion for Order Compelling Arbitration and Order Staying Proceedings, and Declarations of Bruce Gelber and Kenneth Morgan Thomas in Opposition to Petitioner's Motion to Compel Arbitration filed.
April 1, 1985	Petitioner Kidder, Peabody & Co. Incorporated's Reply Memorandum in Support of Motion for Order Compelling Arbitration filed.
April 4, 1985	Supplemental Brief of Respondent Thomas in Opposition to Motion for Order Compelling Arbitration filed.
April 4, 1985	Court orders that matter stand submitted.

April 9, 1985	Court orders parties to submit in writing the results of the Motion for Order Staying Proceedings and the Petition for Order Compelling Arbitration in the case of *Thomas v. Kidder, Peabody & Co., Barclay Perry, James Johnston,* in the Superior Court of the State of California.
April 12, 1985	Thomas' Response to April 9, 1985 Order filed.
April 16, 1985	Kidder, Peabody's Status Report of Los Angeles County Superior Court Action filed.
April 18, 1985	Thomas files Response and Objection to Kidder, Peabody's Status Report.
April 25, 1985	Order Denying Motion for Order Compelling Arbitration and Motion for Order Staying Proceedings and Granting Cross-Motion to Dismiss Petition to Compel Arbitration entered.
April 29, 1985	Thomas' Further Response to District Court Request for Status of State Court Proceedings filed.
May 24, 1985	Kidder, Peabody & Co. Incorporated files Notice of Appeal to the Ninth Circuit.

Proceedings Before United States Court of Appeals, Ninth Judicial Circuit:

October 21, 1985	Appellant's Opening Brief filed.
November 24, 1985	Appellee's Reply Brief filed.
March 3, 1986	Court sets matter on April 10, 1986 hearing calendar for oral argument.
September 22, 1986	Order vacating submission of case and remanding to District Court for purpose of clarifying the grounds upon which the Court granted Thomas' Cross-Motion to Dismiss entered.
September 30, 1986	United States District Court issues Order clarifying its Order of April 25, 1985 in response to remand of Court of Appeals.

Case Number: C529105
ORIGINAL FILED
Jan. 4, 1985
COUNTY CLERK

Attorney or party without Attorney (Name and Address) — Telephone

Julian B. Fensten
A Professional Corporation
700 S. Flower St., 22nd Floor
Los Angeles, CA 90017
Attorney for Plaintiff

Insert name of court, judicial district or branch court, if any, and post office and street address:
Superior Court, County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

Plaintiff: Kenneth Morgan Thomas

Defendant: Kidder, Peabody & Co., Barclay Perry, James Johnston
☒ Does 1 to 20

COMPLAINT Personal Injury, Property Damage, Wrongful Death

☐ Motor Vehicle
☐ Property Damage
☐ Personal Injury
☒ Other (specify): Conversion; Conspiracy to Commit Conversion; Breach of Fiduciary Duty; Breach of Contract
☐ Wrongful Death
☒ Other Damages (specify): Exemplary and Punitive Damages

1. This pleading, including attachments and exhibits, consists of the following number of pages: 8

2. a. Each plaintiff named above is a competent adult
   ☐ Except plaintiff (name):
   ☐ a corporation qualified to do business in California
   ☐ an unincorporated entity (describe):
   ☐ a public entity (describe):
   ☐ a minor ☐ an adult
   ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
   ☐ other (specify):

☐ other (specify):
☐ Except plaintiff (name):
  ☐ a corporation qualified to do business in California
  ☐ an unincorporated entity (describe):
  ☐ a public entity (describe):
  ☐ a minor ☐ an adult
    ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed
    ☐ other (specify):
☐ other (specify):

b. ☐ Plaintiff (name):
is doing business under the fictitious name of (specify):

and has complied with the fictitious business name laws.

c. ☐ Information about additional plaintiffs who are not competent adults is shown in Complaint — Attachment 2c.

3. a. Each defendant named above is a natural person
☒ **Except** defendant *(name):*
Kidder, Peabody & Co.
☒ a business organization, form unknown
☒ a corporation
☒ an unincorporated entity *(describe):*
A Partnership or a Sole Proprietor
☐ a public entity *(describe):*
☐ Other *(specify):*

☒ **Except** defendant *(name):*
Does 1-20
☒ a business organizaton, form unknown
☒ a corporation
☒ an unincorporated entity *(describe):*
A Partnership or a Sole proprietor
☐ a public entity *(describe):*
☐ other *(specify):*

☒ **Except** defendant *(name):*

Barclay Perry
☒ a business organization, form unknown
☒ a corporation
☒ an unincorporated entity *(describe):*
A Partnership or a Sole Proprietor
☐ a public entity *(describe):*
☐ other *(specify):*

☐ **Except** defendant *(name):*
☐ a business organization, form unknown
☐ a corporation
☐ an unincorporated entity *(describe):*
☐ a public entity *(describe):*
☐ other *(specify):*

b. ☐ The true names and capacities of defendants sued as Does are unknown to plaintiff.

c. ☐ Information about additional defendants who are not natural persons is contained in Complaint — Attachment 3c.

d. ☐ Defendants who are joined pursuant to Code of Civil Procedure section 382 are *(names):*

4. ☐ Plaintiff is required to comply with a claims statute, **and**
  a. ☐ plaintiff has complied with applicable claims statutes, **or**
  b. ☐ plaintiff is excused from complying because *(specify):*

5. This court is the proper court because
☒ at least one defendant now resides in its jurisdictional area.
☒ the principal place of business of a corporation or unincorporated association is in its jurisdictional area.
☒ injury to person or damage to personal property occurred in its jurisdictional area.
☒ other *(specify):* See paragraph 9

6. ☐ The following paragraphs of this complaint are alleged on information and belief *(specify paragraph numbers):*

7. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are

   ☐ listed in Complaint — Attachment 7 ☐ as follows:

8. Plaintiff has suffered

   ☐ wage loss

   ☐ hospital and medical expenses

   ☐ property damage

   ☒ loss of use of property

   ☒ general damage

   ☐ loss of earning capacity

   ☒ other damage *(specify):*

   Compensatory Damages for Conversion, Civil Conspiracy to Commit Conversion, and Breach of Fiduciary Duty; Damages for Breach of Contract Exemplary and Punitive Damages

9. Relief sought in this complaint is within the jurisdiction of this court.

10. PLAINTIFF PRAYS

    For judgment for costs of suit; for such relief as is fair, just and equitable; and for

    ☒ compensatory damages

    ☐ **(Superior Court)** according to proof.

    ☐ **(Municipal and Justice Court)** in the amount of $

    ☒ other *(specify):*

    A. Damages for Conversion in sum of $150,000.00
    B. Damages for Civil Conspiracy to Commit Conversion in sum of $150,000.00
    C. Damages for Breach of Fiduciary Duty in sum of $150,000.00
    D. Damages for Breach of Contract in the sum of $40,000.00
    E. Exemplary Damages in sum of $1,500,000.00

11. The following causes of action are attached and the statements above apply to each: *(Each complaint must have one or more causes of action attached.)*

    ☐ Motor Vehicle

    ☐ General Negligence

    ☒ Intentional Tort

    ☐ Products Liability

    ☐ Premises Liability

    ☒ Other *(specify):* Conversion
    Conspiracy to Commit Conversion
    Breach of Fiduciary Duty
    Breach of Contract

JULIAN B. FENSTEN, A Professional Corporation
(Type or print name)

/s/ BRUCE GELBER
(Signature Of Plaintiff Or Attorney)
BRUCE GELBER

First CAUSE OF ACTION—Intentional Tort (Conversion)

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

CONV IT-1 Plaintiff *(name):* Kenneth Morgan Thomas

alleges that defendant *(name):* Kidder, Peabody & Co., Barclay Perry, James Johnston (Defendant Kidder, Peabody & Co. is herein referred to as defendant Kidder, Peabody.)

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on or about May, 1984 at *(place):* Los Angeles, California

CONV IT-2 *(description of reasons for liability):* At all times material herein, each defendant was acting in the course and scope of his employment for defendant, Kidder, Peabody. An oral agreement was made in October, 1982, between plaintiff and defendants Johnston, which agreement was supervised by defendant Perry on behalf of defendant Kidder, Peabody. Said agreement provided, in material part, that plaintiff would receive the account executive commissions on the sale of the core stock owned by any "insider" (including his family and related entities) who was introduced to defendant Kidder, Peabody by plaintiff.

CONV IT-3 Prior to May, 1984, plaintiff introduced Robert Call, an "insider", to defendant Kidder, Peabody. In connection with the sale of the said Robert Call's core stock in May, 1984, the account executive commission was worth $40,000.00. Plaintiff had a right of possession of said commission in the sum of $40,000.00 in accordance with the terms of the above-described agreement since plaintiff had introduced the said "insider" (Robert Call) to defendant Kidder-Peabody.

CONV IT-4 Defendants interfered with plaintiff's right of possession of said commission ($40,000.00) by wrongfully withholding said commission from plaintiff and by misdelivering the same to co-defendant Johnston.

CONV IT-5 Plaintiff's demand for the return of his said commission was refused by defendants.

1 ##

CONV IT-6 Paragraphs Ex-1, Ex-2, and Ex-3; BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC IT-1 through CC IT-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

Second CAUSE OF ACTION—Intentional Tort
(Civil Conspiracy)

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

CC IT-1 Plaintiff *(name):* Kenneth Morgan Thomas

alleges that defendant *(name):* Kidder, Peabody & Co., Barclay Perry, James Johnston (Defendant Kidder, Peabody & Co. is herein referred to as defendant Kidder, Peabody.)

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on or about May, 1984 at *(place):* Los Angeles, California

(description of reasons for liability):

CC IT-2 BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC-IT-1 through CC IT-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

CC IT-3 Prior to May, 1984, an unlawful agreement was made between defendants whereby defendant would interfere with and deprive plaintiff of possession of the account executive commissions he was entitled to (as specified herein in Paragraphs CONV IT-2 through CONV IT-4) in connection with the sale of the core stock owned by an "insider" (including his family and related entities) who was introduced to defendant Kidder, Peabody & Company by plaintiff.

CC IT-4 In May, 1984, plaintiff discovered that a $40,000.00 commission to which plaintiff was entitled had been misdelivered by defendants Kidder, Peabody and Perry to co-defendant Johnston. Plaintiff complained to defendants regarding said conduct; however defendants have refused to rectify this situation.

CC IT-5 As a result of defendants conduct, plaintiff has suffered damages in the sum of $40,000.00 and has incurred legal expenses in order to obtain relief.

CC IT-6 EX-1 through EX-3 are incorporated herein by this reference as though set forth in full.

Third CAUSE OF ACTION — Intentional Tort
(Breach of Fiduciary Duty)

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

FIDUC IT-1. Plaintiff *(name):* Kenneth Morgan Thomas

alleges that defendant *(name):* Kidder, Peabody & Co., Barclay Perry, James Johnson (Defendant Kidder & Peabody & Co., is herein referred to as defendant Kidder, Peabody.)

☒ Does 1 to 20

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant intentionally caused the damage to plaintiff on or about: May, 1984 at *(place):* Los Angeles, California

(*description of reasons for liability*):

FIDUC IT-2 Paragraphs Ex-1, Ex-2, and Ex-3; BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC IT-1 through CC T-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

FIDUC IT-3 That by administering and controlling the funds involved in the hereinbefore-described transactions, defendants agreed and promised that if core stock owned by Robert Call (plaintiff's referral) was sold, then the duty of defendants to pay to plaintiff his share of the commission would arise.

FIDUC IT-4 In March, 1984, after the sale of some of Mr. Call's core stock, plaintiff discovered that the account executive commission to which he was entitled had been misdelivered by defendants to co-defendant Johnston. When plaintiff complained, defendants rectified their conduct by re-directing to plaintiff his earned commission.

FIDUC IT-5 In May, 1984, plaintiff discovered that, once again, his earned commission in connection with the sale of the core stock of his referral, Robert Call, had been misdelivered by defendants to co-defendant Johnston. Defendants have chosen to ignore plaintiff's complaints in

this regard. Defendant Perry represented that plaintiff could receive his said commission in connection with said sale in May, 1984, only upon condition that plaintiff would remain in defendants' employment.

FIDUC IT-6 After defendant duty arose to deliver to plaintiff his said commission, the sum of money attributable to said commission was no longer the property of defendants but was held by said defendants for the sole benefit and use of plaintiff, thereby creating a fiduciary relationship between defendants and plaintiff.

FIDUC IT-7 Defendants breached their fiduciary duty to plaintiff by the acts or omissions set forth herein, particular those set forth in paragraphs FIDUC IT-4 through FIDUC IT-6.

FIDUC IT-8 Paragraphs EX-1 through EX-3 are incorporated by this reference as though set forth in full.

Fourth CAUSE OF ACTION — Breach of Contract

ATTACHMENT OF ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

BC-1 Plaintiff (*name*): Kenneth Morgan Thomas

alleges that on or about (*date*):
a ☐ written ☒ oral ☐ other (*specify*):
agreement was made between (*name parties to agreement*): Plaintiff Kenneth Morgan Thomas, Defendant Kidder, Peabody & Co., Defendant Barclay Perry, Defendant James Johnston
☐ A copy of the agreement is attached as Exhibit A, **or**
☒ The essential terms of the agreement ☐ are stated in Attachment BC-1 ☒ are as follows (*specify*):

In Exchange for introducing "insiders" (valuable clientele) to defendant Kidder, Peabody, plaintiff was entitled to immediate possession of the account executive commission on the sale of the core stock owned by said "insider" (including his family and related entities).

BC-2 On or about (*dates*): May, 1984
defendant breached the ageement by ☐ the acts specified in Attachment BC-2 ☒ the following acts (*specify*):

Defendants wrongfully withheld from plaintiff the account executive's portion of the commission (worth $40,000.00) on the sale of core stock of an "insider" (Robert Call) who had been introduced to defendant Kidder, Peabody by plaintiff; instead, the said commission was misdelivered to co-defendant Johnston.

BC-3 Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4 Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement
☐ as stated in Attachement BC-4 ☒ as follows *(specify):*

Damages in the sum of $40,000.00 for breach of contract.

BC-5 ☐ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of $
☐ according to proof.

BC-6 ☒ Other: CONV IT-1 through CONV IT-5 are incorporated by this reference as though set forth in full herein.

EXEMPLARY DAMAGES ATTACHMENT

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

EX-1 As additional damages against defendant (*name*):
Kidder, Peabody & Co., Barclay Perry, James Johnston

Plaintiff alleges defendant was guilty of
☒ malice
☐ fraud
☒ oppression
as defined in Civil Code section 3294, and plaintiff should recover, in addition to actual damages, damages to make an example of and to punish defendant.

EX-2 The facts supporting plaintiff's claim are as follows:
Paragraphs BC-1 through BC-6; FIDUC IT-1 through FIDUC IT-8; CC IT-1 through CC IT-6; and CONV IT-1 through CONV IT-6 are incorporated by this reference as though set forth in full herein.

Said facts clearly reveal that defendants acted with conscious disregard for the rights of plaintiff, that defendants wrongfully converting plaintiff's earned commission to the possession of a co-defendant, and that defendants conduct was outrageous in view of the special trust and confidence inherent in the relationship between the parties.

Case No. C 529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

VS.

KIDDER PEABODY & CO.,
BARCLAY PERRY, JAMES JOHNSTON,
Defendants.

ANSWER OF DEFENDANTS KIDDER, PEABODY & CO. INCORPORATED, BARCLAY PERRY AND JAMES JOHNSTON TO UNVERIFIED COMPLAINT, PURSUANT TO C.C.P. § 431.30(d)

Original Filed Feb. 13, 1985.

Defendants Kidder, Peabody & Co. Incorporated, Barclay Perry and James Johnston hereby make their Answer to the Complaint for Damages served herein on January 15, 1985.

GENERAL DENIAL

1. Pursuant to California Code of Civil Procedure § 431.30(d), defendants generally deny each and every allegation contained in the Complaint.

FIRST AFFIRMATIVE DEFENSE

2. The Complaint, and each cause of action therein, is subject to a binding agreement to arbitrate controversies.

SECOND AFFIRMATIVE DEFENSE

3. The Complaint fails to state a cause of action against defendants.

WHEREFORE, defendants Kidder, Peabody & Co. Incorporated, Barclay Perry and James Johnston pray that:

(1) Plaintiff take nothing by this action;

(2) They be awarded their costs of suit incurred herein; and

(3) They recover such other and further relief as the Court deems just and proper.

Dated: February 13, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By MAREN E. NELSON
Attorneys for Defendants
Kidder, Peabody & Co.
Incorporated, Barclay Perry
and James Johnston

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On February 13, 1985, I served the foregoing document described as Answer of Defendants Kidder, Peabody & Co. Incorporated, Barclay Perry and James Johnston to Complaint, pursuant to C.C.P. § 431.30(d) on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Julian B. Fensten, Esq.
700 South Flower Street, 22nd Floor
Los Angeles, California 90017

☒ (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on February 13, 1985, at Los Angeles, California.

(By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee. Executed on , 19 , at , California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL
Type or Print Name

/S/
Signature

Case No. C 529105

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

VS.

KIDDER PEABODY & CO., BARCLAY PERRY, JAMES JOHNSTON,
Defendants.

(1) Notice of Hearing on Motion and Petition; (2) Motion for Order Staying Proceedings; (3) Petition for Order Compelling Arbitration; (4) Memorandum of Points and Authorities.

Date: March 11, 1985
Time: 9:00 A.M.
Dept: 81

Original Filed: Feb. 22, 1985

TO PLAINTIFF KENNETH MORGAN THOMAS AND TO HIS COUNSEL OF RECORD HEREIN JULIAN FENSTEN AND BRUCE GELBER:

PLEASE TAKE NOTICE that on Monday, March 11, 1985, at 9:00 a.m., or as soon thereafter as counsel may be heard in Department 81 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston will move the Court for an Order staying proceedings in the above-entitled action. Further, defendants Barclay Perry and James Johnston will petition the Court for an Order compelling arbitration of the claims asserted in plaintiff's Complaint herein.

Said Motion and Petition will be based on the grounds that plaintiff Kenneth Morgan Thomas ("plaintiff") entered into a written agreement to arbitrate any controversy arising out of his employment with Kidder Peabody, or the termination thereof, pursuant to the Rules of the Board of Governors of the New York Stock Exchange, Inc., and that the matters complained of in the Complaint constitute controversies subject to arbitration under said agreement and under the laws of the United States.

Said Motion and Petition will be based upon the provisions of 9 U.S.C. §§ 2, 3 and 4 and California Code of Civil Procedure §§ 1281, 1281.2, and 1281.4; this Notice; the Memorandum of Points and Authorities annexed hereto; all the pleadings, records and papers on file in the above-entitled action; and such oral and documentary evidence as may be presented at the hearing on said Motion and Petition.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON
Attorneys for Defendants
Kidder Peabody & Co.,
Incorporated, Barclay Perry
and James Johnston

MOTION FOR ORDER STAYING PROCEEDINGS

Pursuant to the provisions of 9 U.S.C. §§ 2 and 3 and California Code of Civil Procedure § 1281.4, defendants Kidder Peabody & Co., Incorporated, Barclay Perry and James Johnston hereby move this Court for an Order Staying Proceedings in this action until arbitration is had of the clains which are the subject of the Complaint herein, and an award made by the arbitrators, or, alternatively, the United States District Court finds that arbitration is not appropriate.

This Motion is additionally based on the annexed Petition for Order Compelling Arbitration.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON
Attorneys for Defendants
Kidder Peabody & Co.,
Incorporated, Barclay Perry
and James Johnston

PETITION FOR ORDER COMPELLING ARBITRATION

Defendants Barclay Perry and James Johnston hereby petition this Court for an Order Compelling Arbitration of the claims which are asserted in, and which are the subject of, plaintiff's Complaint, in accordance with the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc.

This Petition is based on the grounds that a written agreement, attached hereto as Exhibit A, to arbitrate controversies that arise out of plaintiff's employment with Kidder Peabody or the termination thereof, exists between the parties, the matters set forth in the Complaint constitute such a controversy, and plaintiff has failed and refused to arbitrate said controversy.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON
Attorneys for Defendants
Kidder Peabody & Co.,
Incorporated, Barclay Perry
and James Johnston

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION AND PETITION

1. Plaintiff Has Entered Into A Written Agreement To Arbitrate The Claims Asserted In The Complaint.

On or about August 16, 1982, plaintiff Kenneth Morgan Thomas ("plaintiff") sought employment with Kidder, Peabody & Co. Incorporated ("Kidder, Peabody"). Kidder Peabody is a registered broker/dealer of securities and a member firm of the New York Stock Exchange, Inc. ("N.Y.S.E."). Thomas sought employment as a registered representative and as an officer of the firm.

In connection with his employment Thomas completed and executed a Uniform Application for Securities Industry Registration (Form U-4), a copy of which is attached hereto as Exhibit A, Form U-4, which was filed with the N.Y.S.E. on September 14, 1982. Form U-4 provides, at paragraph 5 thereof, that:

> "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register. . ."

Among the organizations with which Thomas registered was the N.Y.S.E. Rule 347 of the N.Y.S.E., attached hereto as Exhibit B, provides that:

> "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization *shall be settled by arbitration, at the instance of any party, in accordance with the arbitration procedure prescribed in these Rules.*" [Emphasis supplied].

The Rules of the N.Y.S.E. pertaining to arbitration are attached hereto as Exhibit C.

As appears more fully in the Complaint herein, Thomas' claims deal with controversies arising out of his employment at Kidder, Peabody and his compensation therefor. They are thus subject to arbitration pursuant to Rule 347 of the N.Y.S.E. and Form U-4.

2. Procedural Status Of This Case

This action was filed January 4, 1985. Although service of process was defective, defendants filed their Answer on February 13, 1985. Defendants thereafter made demand upon Thomas for arbitration of his claims herein, which demand was not timely acceded to by Thomas. A copy of the demand letter is attached hereto as Exhibit D. Accordingly, defendant Kidder, Peabody had filed a petition in the United States District Court for the Central District of California entitled *Kidder, Peabody & Co. Incorporated v. Kenneth Morgan Thomas* seeking an order of the United States District Court, pursuant 9 U.S.C. §§ 2, 3, and 4, that the arbitration agreement between the parties be given effect, and the proceedings before this Court stayed. Thomas has yet to respond to that Petition.

Defendants are now before this Court seeking the following relief:

(1) All defendants seek a stay of this proceding pending arbitration, or, in the alternative, a determination by the United States District Court that arbitration is not appropriate;

(2) Defendants Barclay Perry and James Johnston seek an order of this court to compel arbitration of the claims herein as brought against them.

3. The Court Must Order Arbitration In Accordance With The Written Agreements And Must Stay These Proceedings Pending Arbitration.

Plaintiff has entered into a written agreement to arbitrate controversies. Accordingly, whether the agreements are viewed under controlling federal law, or the law of the State of California, this Court must stay the proceedings before it and order arbitration of plaintiff's claims pursuant to the rules of the N.Y.S.E.

A. *Federal Law.*

The United States Arbitration Act, 9 U.S.C. §§ 1-14, provides that the agreement between plaintiff and Kidder Peabody herein must be given effect and require that this court's proceeding be stayed pending arbitration of plaintiff's claims.

Section 2 of the Act, 9 U.S.C. § 2, provides that:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be *valid, irrevocable,* and *enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract." [Emphasis added.]

The United States Supreme Court has recently recognized that:

> "Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.* . . . The Arbitration Act establishes that, as a matter of federal law, any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

Moses H. Cone Hospital v. Mercury Construction Corporation, 460 U.S. 1, 74 L.Ed.2d 765, 785, 103 S.Ct. 927 (1983) [Emphasis added].

The United States Supreme Court has further held that:

"The Arbitration Act . . . creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. . . . [*E*]*nforcement of the Act is left in large part to the state courts.* . . ."

Id. at page 786, note 32 [Emphasis added].

Here, the arbitration clause in question is written and appears in a contract evidencing transactions involving interstate commerce, *i.e.,* securities transactions. Thus, the agreements to arbitrate are, pursuant to 9 U.S.C. § 2, valid, irrevocable, and enforceable.

Numerous federal courts have carefully considered the applicability and enforceability of Rule 347, and they have uniformly concluded that the N.Y.S.E. Constitution and Rules constitute binding agreements between member firms and their registered representatives creating a legal obligation on the part of both parties to arbitrate. *See, Muh v. Newberger Loeb & Co.,* 540 F.2d 970, 937 (9th Cir. 1976); *Coenen v. W.R. Pressprich & Co.,* 453 F.2d 1209, 1211 (2d Cir.), *cert. denied,* 406 U.S. 949 (1972); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Hovey,* 726 F.2d 1286 (8th Cir. 1984); *Downing v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 725 F.2d 192 (2d Cir. 1984).

Since the agreements are valid, this Court is *required, as a matter of substantive federal law,* to compel arbitration of plaintiff's claims and stay the proceedings herein pursuant to 9 U.S.C. §§ 3 and 4. Section 4 provides that upon receiving a petition to compel arbitration:

"The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the Court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

9 U.S.C. § 4 [Emphasis added.] *See also, Southland Corporation v. Keating,* ____ U.S. ____, 104 S. Ct. 852, 79 L. Ed. 2d 1, 12-13 (1984).

Further, 9 U.S.C. § 3 provides that:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under the agreement, *shall,* on application of one of the parties, *stay the trial* of the action until such arbitration has been had in accordance with the terms and agreement. . ."

9 U.S.C. § 3 [Emphasis added.]

Here, the arbitration agreements are broadly worded to require arbitration of *any* controversy between a registered representative such as plaintiff and Kidder Peabody arising out of plaintiff's employment, or the termination thereof, by Kidder Peabody. Accordingly, the claims are referable to arbitration, and, pursuant to 9 U.S.C. § 3, this Court *must* stay the proceedings before it.

B. *California Law.*

A similar result would be reached were California law applicable.

Section 1281 of the California Code of Civil Procedure ("CCP") provides that:

> "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is *valid, enforceable* and *irrevocable,* save upon such grounds as exist for the revocation of any contract." [Emphasis added.]

Consistent with § 1281, California courts have long favored arbitration proceedings to effect the summary disposition of controversies. *Lewsadder v. Mitchum, Jones & Templeton, Inc.,* 36 Cal.App.3d 255, 259, 111 Cal.Rptr. 405 (1973); *Parr v. Superior Court,* 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983). As stated by the court in *Vernon v. Drexel Burnham & Co.,* 52 Cal.App.3d 706, 716, 125 Cal.Rptr. 147 (1975):

> "[T]here is perhaps no higher public policy than to uphold and give effect to contracts validly entered into and legally permissible in subject matter."

In furtherance of the policy favoring arbitration, CCP § 1281.2 *requires* a court to order arbitration under such circumstances as are present in this case, in that it provides:

> "On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, *the court shall order the petitioner and the respondent to arbitrate the controversy* if it determines that an agreement to arbitrate the controversy exists..." [Emphasis added.]

Under this provision,

> "the court's jurisdiction is limited to making two determinations: first, that an agreement to arbitrate the controversy exists, and second, that one party refuses to arbitrate."

Office and Professional Employees Union, Local 29 v. Sea-Land Service, Inc., 90 Cal.App.3d 844, 847, 153 Cal.Rptr. 621 (1979).

Form U-4 pertains specifically to plaintiff's employment at Kidder Peabody and the termination thereof. The agreement, as extracted above, is broadly written to require arbitration of *any* controversy arising out of that employment. Accordingly, arbitration must be ordered pursuant to CCP § 1281.4, and the proceedings before this Court must also be stayed, as the statute expressly provides that "if a court . . . has ordered arbitration of a controversy, [it] . . . *shall*, upon motion of a party to such action or proceeding, stay the action or proceeding until arbitration has been had in accordance with the order to arbitrate . . . ." [Emphasis added.] *See also, Parr v. Superior Court*, 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983); *Ericksen v. 100 Oak Street*, 35 Cal. 3d 312, 323, 197 Cal.Rptr. 581, 587, 673 P.2d 251, 257 (1983).

In view of the strong policy enunicated by the United States, and California through the enactment of the aforementioned statutory provisions respecting arbitration of controversies, and in view of the existence of the arbitration agreement between the parties, it is clear that arbitration of this matter should be compelled and proceedings before this Court stayed.

4. The Arbitration Agreement Entered Into By Plaintiff Applies To His Claims Against Defendants Perry and Johnston.

The Complaint, at page 4 (Conv. IT-2), alleges that Perry and Johnston, in doing the acts alleged, were acting within the course and scope of their employment with defendant Kidder Peabody. Accordingly, the agreement which plaintiff entered into embraces the acts of Kidder Peabody's agents and employees (including Perry and Johnston) since Kidder Peabody, as a corporation, cannot act otherwise than through and by such agents and employees. This rule was expressly and unequivocably articulated by the Court of Appeal in *Berman v. Dean Witter & Co., Inc.*, 444 Cal.App.3d 999, 1004, 119 Cal.Rptr. 130 (1975). That case involved an arbitration provision in a customer's agreement which is similar to the agreement in this action. Accordingly, the fact that Perry and Johnston are not signatories to the Agreement does not exclude or separate them, as alleged agents and employees of Kidder Peabody, from the benefit of arbitration.

5. Conclusion

Plaintiff executed a written agreement in which he expressly and unequivocally agreed to arbitrate. The Complaint alleges claims which fall within the class of controversies covered by said agreement. Perry and Johnston are entitled to the benefit of arbitration. It is therefore respectfully urged that plaintiff be ordered to submit his claims to arbitration pursuant to the rules of the NYSE, and that, pending the completion of said arbitration, or a ruling of the District Court that arbitration is

not appropriate, the proceedings before this Court be stayed.

DATED: February 22, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By: MAREN E. NELSON
Attorneys for Defendants
Kidder Peabody & Co.,
Incorporated, Barclay Perry
and James Johnston

EXHIBIT A

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION

Thomas	Kenneth	Morgan			
05/16/82	07613	Kidder, Peabody &Co., Inc.			
10 Hanover Square		New York	NY	10005	
82L	707 Wilshire Boulevard, Suite 3100	Los Angeles,	CA	90017	

SRO

STATE

Vice President

NASD		12/69		Series 1			
NYSE		12/70		SERIES			

Kenneth Morgan Thomas — 8-25-82

Kenneth Morgan Thomas — 8-25-82

G. Barclay Perry

14734

#26. Employment History (cont'd)

Eppler, Guerin, Turner 2001 Bryan Tower, Dallas, TX 75205	7/78 to 4/79	full trader	personal
Self-employed 1104 Washington Ave., Santa Monica, CA 90404	12/76 to 7/78	Personal Inv.	
Morgan, Stanley & Co. 1251 Ave. of Americas, NY, NY 10017	3/76 to 12/76	full trader	personal
E.F. Hutton & Co. 1 Battery Park Plaza N.Y. NY 10005	9/72 to 2/76	full trader	relocate
Canton, Fitzgerald & Co. 232 Canon Drive, Beverly Hills, CA 90024	6/71 to 9/72	full trader	personal
Jefferies & Co. 3300 Union Bank Square, Los Angeles, CA 90071	1/70 to 6/71	full trader	personal

#27. Residential History (Cont'd)

7229 Holly Hill Drive, Dallas, TX 75231	7/78 to 3/80
1104 Washington Ave., Santa Monica, CA 90404	12/76 to 7/78
101 W. 57th St., N.Y., NY 10009	3/76 to 12/76
35-24th Place, Venice, CA 90254	7/75 to 2/76
116 Central Park, South, NY, NY 10005	9/72 to 7/75
700 Orange Grove Terrace, So. Pasadena, CA 91101	11/70 to 9/72

TEN YEAR LIMIT DOES NOT APPLY TO QUESTIONS 27 [illegible] ROUGH 29.

[illegible] THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES," CIRCLE QUESTION [illegible] AND ATTACH COMPLETE DETAILS

	YES	NO	
Have you ever			
A. been the subject of a major complaint or legal proceeding?	☐	X	2720
B. been discharged, or requested or permitted to resign for cause?	☐	X	2730
C. been refused coverage under a fidelity or surety bond, or has any surety company paid out any funds on your coverage or requested such coverage?	☐	X	2735
D. had a license, permit, certificate, registration or membership denied, suspended, revoked or reinstated, or had an application withdrawn for cause?	☐	X	2560
E. been the subject of any order, judgment, decree or other sanction of a foreign court, foreign exchange, or foreign governmental or regulatory agency?	☐	X	2580
F. been arrested or indicted for any felony or misdemeanor involving the purchase, sale or delivery of any security or commodity, or arising out of the conduct of the business of a broker, dealer, municipal securities dealer, fiduciary, investment company, investment adviser, underwriter, bank, trust company, insurance company or other financial institution, or involving any crime in which restitution or threats of violence against any person, dishonesty, unlawful taking of any property, or any element of fraud was a factor, or involving conspiracy to commit any of the foregoing?	☐	X	2830
G. been convicted, or pleaded guilty or nolo contendere to any felony or misdemeanor except minor traffic offenses?	☐	X	2870
H. been a principal or employee of any firm, corporation or association which, while you were associated with it, was convicted of, or pleaded guilty or nolo contendere to, any felony or misdemeanor?	☐	X	2890
I. or has any firm, corporation or association of which you have been a principal or officer listed in business, made a composition with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	X	2790
While associated in any capacity in the securities, commodities, investment advisory, real estate, banking or insurance industry or any other business have you ever			
A. been found by the Securities and Exchange Commission or in any jurisdiction to have willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for registration or report required to be filed under the Federal securities laws or under the securities law of any jurisdiction, or in any proceeding before the Securities and Exchange Commission or any jurisdiction relating to securities, the conduct of business or registration as a broker, dealer, municipal securities dealer, or investment adviser or associated person thereof?	☐	X	2880
B. willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, in any report required to be filed with a self-regulatory organization, or in any proceeding before a self-regulatory organization?	☐	X	2890
C. had any temporary or permanent injunction or administrative order entered against you or any broker, dealer, investment adviser, municipal securities dealer, bank or investment firm with which you were associated in any capacity at the time such injunction was entered?	☐	X	2900
D. been associated in any capacity with any broker, dealer, municipal securities dealer, investment adviser or underwriting firm which was suspended, expelled or had its registration denied or revoked by any agency, jurisdiction or organization?	☐	X	2620
E. been found to be the cause of any action cited in 27D?	☐	X	2910
F. been named as an officer, a director, a general partner, or an owner of 10 percent or more of the voting securities of, or a person who, directly or indirectly, through agreement or otherwise, exercised or had power to exercise a controlling influence over the management or policies of a broker, dealer or municipal securities dealer which had been adjudicated bankrupt or for which a trustee has been appointed pursuant to the Securities Investor Protection Act of 1970?	☐	X	2760
Are you currently			
A. the subject of any unsatisfied judgments or liens?	☐	X	2740
B. associated in any additional related capacity or indirectly in business or financial activities with any person which you listed, or in the manner of relationship you should know, is or is subject to a statutory disqualification?	☐	X	2920
C. the subject of any investigation or proceeding, or have you ever been the subject of discipline or found to have violated or to have failed, declined, advised, contemplated, instituted or prevented the violation of any law, rule or regulation by any securities, commodities or banking agency or jurisdiction, any national securities exchange, registered securities association or clearing agency or any other agency or jurisdiction?	☐	X	2702

Kenneth Morgan Thomas
(NAME OF APPLICANT (PRINT OR TYPE))

Kenneth Morgan Thomas 8-23-82
(SIGNATURE OF APPLICANT) (DATE)

(HOME/RESIDENCE ZIP CODE NO.)

G. Barclay Perry
(NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE))

8/25/82
(SIGNATURE OF APPROPRIATE SIGNATORY) (DATE)

ATTACH PASSPORT SIZE AND QUALITY PHOTO

Kenneth H. Thomas
APPLICANT'S NAME
(TYPED OR PRINTED)

Rev. Form U-4 (10)

1. I hereby certify that I have read and understood the foregoing statements and that my responses are true and complete to the best of my knowledge.

2. I hereby apply for registration with the organizations and states indicated in Question 5 and, in consideration of such organizations and states reviewing and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and concepts of the statutes, administrative, constitutions of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such rulings, orders, decisions and directions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decisions of such states and organizations as to the results of any examination that I may be required to pass and be assigned by me as final.

3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable in any for actions taken or omitted to be taken in official capacity or in the course of employment, except as otherwise provided in the statutes, constitutions, constitutions of incorporation, by-laws or the rules and regulations of such states and organizations.

4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 5.

6. I, the undersigned, for the purpose of complying with the laws of the State(s) I have designated in Item 5 relating to either the appearance or sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney to said State(s) upon which may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I was a resident of said State and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

8/25/82 — 8-23-82
(DATE) (SIGNATURE OF APPLICANT) (DATE) (SIGNATURE OF EMPLOYER)

(WITNESS MUST BE ONE OF THE FOLLOWING: PLEASE CHECK APPROPRIATE BOX)

☐ PARTNER OF THE FIRM ☐ BRANCH OFFICE MANAGER

☐ OFFICER OF THE CORPORATION ☐ AUTHORIZED EMPLOYEE

(WITNESS NAME AND ADDRESS)

STATE OF California COUNTY Los Angeles ss:

SUBSCRIBED AND SWORN BEFORE ME THIS 25 DAY OF August A.D. 19 82

OFFICIAL SEAL
HARRY B KAPLAN
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Nov. 26, 1985

(NOTARY PUBLIC) (COUNTY OF) (DATE)

To the best of [illegible] and belief, the applicant meets standards of training, experience and competence which are prescribed by the rules of the self-regulatory organization with which this application is being filed, and the rules governing registered persons of such organization. I am satisfied that the applicant is qualified for the registration which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ this applicant in the capacity stated herein unless and until I receive the approval of any authority which may be required by law. This form has communicated with all the previous employers of the applicant during the past three years, as set forth below:

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	PERSON CONTACTED: WRITTEN	PERSON CONTACTED: VERBAL	PERSON CONTACTED: NO RESPONSE
Jefferies & Co.	Neal E. Nakagiri	V.P. Compliance	3/81	8/82	X		
John Muir & Co	Defunct		10/80	3/81			
Jeffries & Co	Neal E. Nakagiri	V.P. Compliance	4/79	10/80	X		

In addition, I have taken appropriate steps to verify the statements contained in this application and to require that the past record and reputation of the applicant

Please Do Not Write In This Area

8/19/82 — G. Barclay Perry
(DATE) (PRINT NAME OF APPROPRIATE SIGNATORY)

(SIGNATURE OF APPROPRIATE SIGNATORY)

Rev. Form U-4 (10)

BEST AVAILABLE COPY

EXHIBIT B

Rules of Board — Officers and Employees

.11 For purpose of this rule, control is defined in Rule 2.

.12 For the purposes of this rule, the term associated with a member or member organization shall have the same meaning as the term "associated with a member" is defined in Section 3(a)(21) of the Securities Exchange Act of 1934.

.20 Under the appropriate circumstances the Exchange may, in determining control, treat as a single holding stock which is nominally held by different persons or organizations.

Amendment.

December 1, 1977.

¶ 2347 Controversies As to Employment or Termination of Employment

Rule 347. Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Amendments.

April 17, 1958.

April 3, 1975; effective May 1, 1975.

¶ 2348 Registered Representative — Limit of Credit on Own Accounts

Rule 348. Rescinded April 3, 1975 effective May 1, 1975.

¶ 2349 Representatives of the Press

Rule 349. Rescinded October 7, 1982.

¶ 2350 Compensation or Gratuities to Employees of Others

Rule 350. (a) No member, allied member, member organization or employee thereof shall:

(1) employ or compensate any person for services rendered,

(2) give any gratuity in excess of $50 per person per year to

EXHIBIT C

NEW YORK STOCK EXCHANGE, INC.

ARBITRATION

... rules of Board of Directors administered through the facilities of the Exchange prescribing the procedure to be used in arbitration ...

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ARBITRATION RULES

(Rules and Policies Administered by the Office of the Secretary.)

¶ 2600 Arbitration

Rule 600. (a) Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

(b) Under this Code, the New York Stock Exchange, Inc. shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where — having due regard for the purposes of the New York Stock Exchange, Inc. and the intent of this Code — such dispute, claim or controversy is not a proper subject matter for arbitration.

¶ 2601 Simplified Arbitration

Rule 601. (a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person, member, allied member or member organization, subject to arbitration under the Constitution and Rules of the New York Stock Exchange, Inc. involving a dollar amount not exceeding $2,500, exclusive of attendant costs and interest, shall upon demand of the customer(s) or by written consent of the parties be arbitrated as hereinafter provided.

(b) The Claimant shall file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Statement of Claim of the controversy in

dispute, together with documents in support of the claim. The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The Claimant shall pay the sum of $15.00 upon filing of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. The Respondent(s) shall within twenty (20) calendar days from receipt of service file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondent's Answer, together with supporting documents. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of same together with a copy of the Submission Agreement on such Third Party who shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim exceeding $2,500.00, the arbitrator may refer the Claim, Counterclaim and/or Third Party Claim, if any, to a panel of three (3) or five (5) arbitrators in accordance with Rule 607 (Section 8 of this Code) or, he may dismiss the Counterclaim and/or Third Party Claim without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing the Counterclaim and/or Third Party Claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed $15.00.

(e) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (i) file a Reply to any Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s) or, (ii) if the amount of the Counterclaim exceeds the Claim, have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director or Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the New York Stock Exchange, Inc. shall be applicable to proceedings instituted under this Code.

¶ 2602 Hearing Requirements — Waiver of Hearing

Rule 602. (a) Any dispute, claim or controversy, except as provided in Section 2 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

¶ 2603 Time Limitation Upon Submission

Rule 603. No dispute, claim or controversy shall be eligible for submission to arbitration under this Code in any instance where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations.

¶ 2604 Dismissal of Proceedings

Rule 604. At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to the remedies provided by law. The arbitrators shall upon joint request of the parties dismiss the proceedings.

¶ 2605 Settlements

Rule 605. All settlements upon any matter submitted shall be at the election of the parties.

¶ 2606 Tolling of Time Limitation(s) for the Institution of Legal Proceedings

Rule 606. Where permitted by law, the time limitation(s) which would otherwise run or accrue for the institution of legal proceedings, shall be tolled when all the parties shall have filed duly executed Submission Agreements upon the dispute, claim or controversy submitted to arbitration. The tolling shall continue for such period as the New York Stock Exchange, Inc. shall retain jurisdiction upon the matter submitted.

¶ 2607 Designation of Number of Arbitrators

Rule 607. (a) Public Controversies

(1) Except as otherwise provided in this Code in all arbitration matters involving public customers, and where the matter in controversy does not exceed the amount of $100,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers where the amount in controversy is $100,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

¶ 2608 Notice of Selection of Arbitrators

Rule 608. The Director of Arbitration shall inform the parties of the names and business affiliations of the arbitrators at least eight (8) business days prior to the date fixed for the initial hearing session.

¶ 2609 Peremptory Challenge

Rule 609. In an arbitration proceeding being heard by a panel consisting of more than one (1) arbitrator, each party shall have the right to one (1) peremptory challenge. A party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel.

¶ 2610 Disclosures Required of Arbitrators

Rule 610. Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Prior to the commencement of the first hearing session the Director of Arbitration may remove an arbitrator who discloses such information. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section, if the arbitrator who disclosed the information is not removed.

¶ 2611 Disqualification or Other Disability of Arbitrators

Rule 611. In the event that any arbitrator, after the commencement of the first session but prior to the rendition of the award should become disqualified, resign, die,

refuse or be unable to perform or discharge his duties, the Director of Arbitration, upon such proof as he deems satisfactory, shall, where permitted by law, either (a) appoint a new member to the panel to replace such arbitrator, obtaining the consent of the parties; or (b) with the consent or waiver of the parties, direct that the arbitration proceed without the substitution of a new arbitrator.

¶ 2612 Initiation of Proceedings

Rule 612. Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration three (3) executed copies of the Submission Agreement and three (3) copies of the Statement of Claim of the controversy in dispute, together with the documents in support of the claim. The Statement of Claim should specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Answer-Defenses, Counterclaims and/or Cross-Claims

(1) The Respondent(s) shall within twenty (20) business days from receipt of service file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondent's(s') Answer. The Answer shall designate all available defenses to the Statement of Claim and may set forth any related Counterclaim the Respondent(s) may have against the Claimant and any third-party claim against any other

party or person upon any existing dispute, claim or controversy to arbitration under this Code.

(2) If the Respondent(s) has interposed a third-party claim, the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of same together with a copy of the Submission Agreement on such third party who shall respond in the manner provided for response to the Claim.

(3) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third-Party Claim or other responsive pleading, if any. The Claimant may within ten (10) business days file a Reply to the Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s).

(4) The time period to file any pleading, whether such be denominated as a Claim, Answer, Counterclaim, Reply or Third-Party pleading, may be extended for such further periods as may be granted by the Director of Arbitration.

(c) Joining and Consolidation

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes.

(3) All final determinations with respect to joining and consolidation under this subsection shall be made by the arbitration panel.

¶ 2613 Designation of Time and Place of Hearings

Rule 613. Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this section. Notice for each hearing, thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

¶ 2614 Representation by Counsel

Rule 614. All parties shall have the right to representation by counsel at any stage of the proceedings.

¶ 2615 Attendance at Hearings

Rule 615. The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

¶ 2616 Failure to Appear

Rule 616. If any of the parties, after due notice, fails to appear at a hearing or any adjourned hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

¶ 2617 Adjournments

Rule 617. The arbitrators may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

¶ 2618 Acknowledgement of Pleadings

Rule 618. The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

¶ 2619 Subpoena Process

Rule 619. (a) The arbitrators and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. However, the parties shall produce witnesses and present proofs to the fullest extent possible without resort to the issuance of the subpoena process.

(b) Prior to the first hearing session, the parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration. If the parties agree, they may also submit additional documents to the Director of Arbitration for forwarding to the arbitrators.

¶ 2620 Power to Direct Appearances

Rule 620. The arbitrators shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons, members or member organizations. Unless the arbitrators direct otherwise, the party requesting the appearance of a person or the pro-

duction of documents under this section shall bear all reasonable costs of such appearance and/or production.

¶ 2621 Evidence

Rule 621. The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

¶ 2622 Interpretation of Code

Rule 622. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

¶ 2623 Determinations of Arbitrators

Rule 623. All rulings and determinations of the panel shall be by a majority of the arbitrators.

¶ 2624 Record of Proceedings

Rule 624. Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration proceeding shall be kept. If a record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.

¶ 2625 Oaths of the Arbitrators and Witnesses

Rule 625. Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

¶ 2626 Amendments

Rule 626. No amendment to the pleadings shall be permitted after receipt of a responsive pleading except upon the consent of the arbitrators and upon such terms and conditions as they may direct.

¶ 2627 Reopening of Hearings

Rule 627. Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of a party at any time before the award is rendered.

¶ 2628 Awards

Rule 628. (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

¶ 2629 Miscellaneous

Rule 629. This Code shall be deemed a part of and incorporated by reference in every duly-executed Submission Agreement which shall be binding on all parties.

¶ 2630 Schedule of Fees

Rule 630. (a) At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below unless such deposit is specifically waived by the Director of Arbitration.

Amount in Dispute (Exclusive of interest and expenses)	*Deposit*
$2,500 or less	See Simplified Arbitration Section 2
Above $2,500 — but less than $5,000	$100
$5,000 or more — but less than $10,000	$200
$10,000 or more — but less than $20,000	$250
$20,000 or more — but less than $100,000	$350
$100,000 and over	$550

Where the amount in dispute is less than $10,000, no additional deposits shall be required despite the number of sessions. Where the amount in dispute is $10,000 or more and multiple sessions are required, the arbitrators may require any of the parties to make additional deposits for each additional session. In no event shall the aggregate amount deposited per session exceed the amount of the initial deposit.

(b) The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is less than $10,000, total fees to the parties shall not exceed the amount deposited. Where the amount in dispute is $10,000 or more but less than $20,000, the maximum fee shall be $250 per session. Where the amount in dispute is $20,000 or more but less than $100,000, the maximum fee shall be $350 per session.

Where the amount in dispute is $100,000 or more, the maximum fee shall be $550 per session. In no event shall the fees assessed by the arbitrators exceed $550 per session. Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who has made a deposit, the deposit will be refunded.

(c) If the dispute, claim or controversy does not involve or disclose a money claim, the amount to be deposited by the Claimant shall be $100 or such amount as the Director of Arbitration or the panel of arbitrators may require but shall not exceed $550.

(d) Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first session shall entitle the parties to a refund of all but $25 of the amount deposited with the New York Stock Exchange, Inc.

(e) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first session may be subject to such refund of assessed deposits, if any, as the New York Stock Exchange, Inc. may determine.

¶ 2631 [Uniform Arbitration Code]

Rule 631. The provisions of the Uniform Arbitration Code contained in Rules 600 to 630 shall also apply to controversies between members, allied members, member firms and/or member organizations except in so far as such provisions specifically apply to matters involving public customers.

¶ 2632 Schedule of Fees for Member Controversies

Rule 632. At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below:

	Deposit Per Hearing
$2,500 or less	$100*
$2,500 or more but less than $100,000	$350
$100,000 or more	$550

Where the controversy does not involve a money claim, the costs and the amount to be deposited shall be such amount as may be fixed in advance by the Exchange, except that such amount shall not exceed $550 per hearing.

When the controversy is resolved in any way other than by arbitration award, the Exchange shall retain $25.

¶ 2633 Member Controversies

Rule 633. Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to members of the Board of Arbitration provided for by Section 4 of Article VIII of the Exchange Constitution. If the amount (exclusive of interest and costs) involved in the controversy is less than $10,000 the controversy shall be heard by one arbitrator. If such amount is $10,000 or more the controversy shall be heard by at least three but not more than five arbitrators.

Adopted.
November 30, 1983.

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* This shall also be the fee for non-member claimants who are not public customers.

EXHIBIT D

February 13, 1985

Julian B. Fensten, Esq.
700 South Flower Street, 22nd Floor
Los Angeles, California 90017

Re: Kenneth Morgan Thomas v. Kidder, Peabody & Co., et al.; Los Angeles County Superior Court; Case No. C 529105

Dear Mr. Fensten:

This firm represents Kidder, Peabody & Co. Incorporated, Barclay Perry and James Johnston with respect to the above-captioned matter. This matter arises out of Mr. Thomas' employment by Kidder, Peabody. Rule 347 of the New York Stock Exchange, Inc., by which Mr. Thomas has agreed to be bound, provides that:

> "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed in these Rules."

Pursuant to this Rule, defendants therefore make formal demand for arbitration of Mr. Thomas' claims against them, and further demand that the proceedings in the Superior Court be stayed pending the outcome of said arbitration.

Your response to this demand within 10 days of the date of this letter will be appreciated, as we would not want to make an unnecessary Petition to Compel Arbitration.
1 ##

I look forward to hearing from you.

Very truly yours,

Maren E. Nelson
for OVERTON, LYMAN & PRINCE

VERIFICATION

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I have read the foregoing PETITION TO COMPEL ARBITRATION and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am ☒ an Officer ☐ a partner ☐ a of KIDDER, PEABODY & CO. INCORPORATED a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☒ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for , a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on February 22, 1985, at Los Angeles, California. I declare under penalty of perjury under the laws

of the State of California that the foregoing is true and correct.

TERRY L. RICHARDS — /s/

Type or Print Name — Signature

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On Feb. 22, 1985, I served the foregoing document described as (1) NOTICE OF HEARING ON MOTION AND PETITION; MOTION FOR ORDER STAYING PROCEEDINGS; PETITION FOR ORDER COMPELLING ARBITRATION; MEMORANDUM OF POINTS AND AUTHORITIES on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

BRUCE GELBER, ESQ.
Law Offices of Julian B. Fensten
700 South Flower Street, 22nd Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on February 22, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , , 19 , at , California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL — /s/

Type or Print Name — Signature

Case No. C 529 105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,
vs.
KIDDER PEABODY & CO.,
BARCLAY PERRY, JAMES JOHNSTON,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES OF PLAINTIFF KENNETH MORGAN THOMAS IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND IN OPPOSITION TO DEFENDANTS' MOTION FOR ORDER STAYING PROCEEDINGS

Date: April 5, 1985
Time: 9:00 a.m.
Place: Department 81

COMES NOW plaintiff KENNETH MORGAN THOMAS in opposition to defendants' Motion to Compel Arbitration and in opposition to defendants' Motion for an Order Staying Proceedings, and submits the following Memorandum of Points and Authorities and Declaration in opposition thereto.

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OPENING SUMMARY OF ARGUMENT
[Rule 313(d), California Rules of Court]

Plaintiff filed this civil action for the wrongful denial of wages (his earned commissions as an account executive for the corporate-defendant herein, KIDDER PEABODY & CO.). Defendants have moved to compel arbitration of the matters set forth in plaintiff's Complaint on the basis of a purported "agreement" signed by plaintiff in August, 1982, prior to the existence of any dispute between the parties. The Supreme Court of the United States has ruled unanimously that an account executive's civil action for the wrongful denial of wages is not subject to compulsory arbitration, notwithstanding a purported "agreement" to arbitrate all controversies between the parties. California *Labor Code* § 229 provides that actions by an individual to collect wages (which includes commissions as per *Labor Code* § 200) may be maintained without regard to the existence of any private agreement to arbitrate. The purported agreement for compulsory arbitration is an unenforceable contract of adhesion which has been judicially determined to be unduly oppressive, unconscionable, presumptively biased in favor of management and fails to satisfy the minimum standards of integrity. Under the circumstances of this case, arbitration would engender a multiplicity of proceedings rather than conserve judicial resources. Finally, the pending motion is not supported by any affidavit or declaration, and there is no foundation or evidentiary basis to support the pending motion.

STATEMENT OF MATERIAL FACTS

In August, 1982, plaintiff KENNETH MORGAN THOMAS entered the employ of defendant KIDDER PEABODY & CO., as a registered representative ("account executive") in said defendant's Los Angeles office.

At the time of his said employment, and as a condition of obtaining said employment, plaintiff was required to sign a standardized form ("Form U-4"), which contained certain boiler-plate provisions. In August of 1982 when said document was signed by plaintiff, said boiler-plate provisions thereon were not discussed, nor were any of their purported legal implications explained to plaintiff by defendant KIDDER PEABODY, nor were the boiler-plate provisions read by plaintiff. At all times material here, plaintiff was unaware of any purported agreement to submit to arbitration all controversies with KIDDER PEABODY; further, plaintiff was unaware of any purported agreement that he was waiving certain constitutional rights — including the right to a civil trial by jury — in advance of any controversy with defendants.

On January 4, 1985, plaintiff filed this lawsuit seeking relief for the wrongful denial by defendants of wages (earned commissions) which were owed to plaintiff for work he had performed as an employee for defendant KIDDER PEABODY & CO. Plaintiff brought causes of action for Conversion, Conspiracy to Commit Conversion, Breach of Fiduciary Duty, and Breach of Contract arising from the denial of wages, and plaintiff prayed for compensatory and punitive damages because defendants' conduct was particularly egregious in view of the special trust inherent in the relationship between the parties. Plaintiff claimed that defendant BARCLAY PERRY, the House Manager of KIDDER PEABODY & CO., and defendant JAMES JOHNSTON, an account executive with the same said company, conspired with defendant KIDDER PEABODY & CO. in order to deprive plaintiff of his earned commissions.

The pending motion is fatally defective in five important respects.

First, defendants' legal argument slithers in direct opposition to the unanimous, 8-0 ruling of the United States Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383 (1973) — a case directly on point with the pending action, and the ruling of which is controlling herein; and counsel should be faulted for not bringing to this Court's attention this controlling ruling.

Second, California *Labor Code* § 229 provides that actions to collect wages (which includes commissions as per *Labor Code* § 200) by an individual may be maintained without regard to the existence of any private agreement to arbitrate.

Third, the purported agreement for compulsory arbitration is an unenforceable contract of adhesion which has been judicially determined to be unduly oppressive, unconscionable, presumptively biased in favor of management, and fails to satisfy the minimum standard of integrity.

Fourth, under the circumstances of this case, arbitration would engender a multiplicity of proceedings rather than conserve judicial resources.

Fifth, the pending motion is not supported by any affidavit or declaration, and there is no foundation or evidentiary basis to support the pending motion. Defendants' motion is accompanied only by the gratuitous statements of counsel who does not swear to any personal knowledge of the facts involved in this litigation.

I

THE SUPREME COURT OF THE UNITED STATES HAS RULED UNANIMOUSLY THAT AN ACCOUNT EXECUTIVE'S CIVIL ACTION FOR WRONGFUL DENIAL OF WAGES IS NOT SUBJECT TO COMPULSORY ARBITRATION, NOTWITHSTANDING A PURPORTED "AGREEMENT" TO ARBITRATE ALL CONTROVERSIES BETWEEN THE PARTIES.

In bringing their Motion for Compulsory Arbitration, defendants are asking this Court to overrule the United States Supreme Court — but defendants do not even disclose to this Court the existence of the Supreme Court's decision which they now seek to overturn. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383 (1973) (hereinafter "*Ware*"), the identical issues now before this Court arose in a factual setting "on all fours" with the present action: (a) both plaintiffs had been account executives employed in the California office of a member-corporation of the New York Stock Exchange; (b) civil actions had been filed for the wrongful denial of wages due and owing to each plaintiff; and (c) in both cases, defendants asserted that the boilerplate provision in an application form, which plaintiffs had been required to sign as a condition of employment in advance of any dispute, effectively barred the aggrieved employee from access to the civil courts for relief. In *Ware,* the Supreme Court squarely framed the issue as follows:

> "Specifically, we are concerned with the questions (a) *whether, in the context of the present case, § 229 of the California Labor Code, which would preclude compulsory arbitration of wage disputes, is ineffective under the Supremacy Clause . . .*"

Ware, 414 U.S. at 125 [emphasis added]

Section 229 of the *California Labor Code* provides in pertinent part:

> "*Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. . . .*"

Under Section 200 of the *California Labor Code,* the term "wages" is defined as follows:

> "(a) 'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, *commission basis,* or other method of calculation."

Since the underlying lawsuit arises from the wrongful denial of wages (commissions) owed to plaintiff, *Labor Code* § 229 is controlling. Under Section § 229, the purported "agreement" to arbitrate is void and *unenforceable* as a matter of legislative decree and public policy, buttressed by the unanimous ruling of the Supreme Court in *Ware.* Under virtually identical circumstances, the validity of *Labor Code* § 229 was tested before the High Court in *Ware,* and the Court unanimously ruled that the State's interest in protecting wage earners prevailed over the Federal interest in creating uniformity in dispute resolution in the brokerage industry. *See Ware,* 414 U.S. 135-140. The Supreme Court has already performed the balancing of the conflicting State and Federal interests involved in the pending Motion. If ever a matter was controlled by *stare decisis,* it is the Motion pending before this Court.

After careful scrutiny of the competing interests involved, the Supreme Court concluded:

> *"In the area of regulation that we are considering here, California has manifested a strong policy of protecting*

> *its wage earners from what it regards as undesirable economic pressures affecting this employment relationship. The policy prevails in the absence of interference with the federal regulatory scheme. We find no such interference and we also find in the structure of the [Federal Arbitration] Act an intent on the part of Congress that state policies in this area should operate vigorously."*

Ware, 414 U.S. at 139-40 [emphasis added].

The unanimous ruling in *Ware* was underpinned by the Court's consideration of the *legislative history* of the statutes involved. With regard to the legislative history behind *Labor Code* § 229, the Supreme Court observed:

> "By the addition of § 229 to its Labor Code in 1959 California codified for the wage earner, with the solitary-collective-bargaining agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate . . . *This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance.* The statute's legislative history is sparse, but the exception carved out for collective-bargaining disputes provides the obvious conclusion that it was the individual, nonunion, and otherwise unprotected wage earner who was the intended beneficiary of the State's grace in providing this remedy. This conclusion is fortified by the fact that § 200(a) of the Code defines 'wages' broadly to include 'all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, *commission basis*, or other method

> of calculation.' And the California court itself has noted *'the established policy . . . of protecting and promoting the right, '"favored" in the law,' of the wage earner 'to all wages lawfully accrued to him.' City of Ukiah v. Fones*, 64 Cal.2d 104, 108, 48 Cal.Rptr. 865, 867, 410 P.2d 369, 371 (1966). It may be, too, that the legislature felt that arbitration was a less than adequate protection against awarding the wage earner something short of what was due compensation.

Ware, 414 U.S. at 130-31 [emphasis added].

It has been but twelve years since the High Court's unanimous ruling was handed down in *Ware*, and yet these defendants are asking this Court to throw out this ruling in *Ware* without even calling attention to its very existence. In the short period of time that has passed since the High Court ruled on this subject, the paramount importance of the State's concern with protecting and safeguarding the rights of wage earners against unscrupulous employment practices has markedly grown in stature. See *Cancellier vs. Federated Department Stores*, 672 F.2d 1312 (9th Cir. 1982); *Tameny vs. Atlantic Richfield Company*, 27 Cal.3d 167, 164 Cal.Rptr. 839 (1980); *Pugh vs. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981). As the California Supreme Court noted in its landmark ruling in *Tameny:*

> "In the last half century the rights of employees have not only been proclaimed by a mass of legislation touching upon almost every aspect of the employer-employee relationship, but the courts have likewise evolved certain additional protections at common law."

Tameny, 27 Cal.3d at 178.

It was upon a sound and studied basis that the Supreme Court in *Ware* unanimously ruled that an account executive's action for the wrongful denial of wages could not be compelled to arbitration, notwithstanding any purported "agreement" to the contrary.

The cases cited by defendants, while they somehow relate to the general subject matter at issue, do not deal squarely with the issues at bar. They are tangential at best, and do not displace or even purport to overrule the controlling case authority, *Ware*, and the controlling statute, *California Labor Code* § 229.

While defendants refuse to acknowledge the authority of the Supreme Court's ruling in *Ware*, the case defendants' have relied on, *Muh v. Newberger, Loeb & Co., Inc.*, 540 F.2d 970 (1976), does *in fact* acknowledge the authority of *Ware*, and distinguishes said case on a basis which is not applicable to the present action. The ruling in *Muh* hinged on the factual determination whether Muh's claim for compensation came within the scope of *California Labor Code* § 229, i.e., was Muh seeking recovery of unpaid "wages"? The *Muh* court determined that the compensation sought by that plaintiff was not "wages" as defined in § 200(a) of the *California Labor Code* and, therefore, *Labor Code* § 229 did not apply. The *Muh* case was resolved on the basis of a factual finding which bears no relevance to the case at bar. *Labor Code* § 229 directly applies in this action since plaintiff is seeking relief for the wrongful denial of earned commissions. The court in *Muh* specifically acknowledged the authority of *Ware* by observing:

> "The Supreme Court has held that the California statute [*Labor Code* § 229] *is neither preempted by stock exchange rules requiring arbitration nor by the federal policy favoring self-regulation of the securities industry. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973)."

Muh, 540 F.2d at 973 n.3 [emphasis added].

Muh, therefore, is completely distinguishable from the case at bar for the very reasons set forth in the *Muh* opinion itself.

Likewise, the case of *Coenen vs. R.W. Pressprich & Company*, 453 F.2d 1209 (2nd Cir. 1972), which is cited and relied on by defendants, is wholly inapplicable to the case at bar on several distinct grounds. First, *Coenen* did not involve a dispute as to wages. As previously discussed, the Supreme Court has ruled that *California Labor Code* § 229 provides, in the first instance, a judicial forum where there exists a dispute as to wages, notwithstanding the existence of a purported agreement to arbitrate any such controversies. *Ware, supra.*

As a second and distinct ground, *Coenen* is distinguishable because Coenen's agreement to arbitrate was made *after* the dispute had already arisen. As that court noted, "Coenen agreed to arbitrate '[a]ny controversy between * * * members * * *,' with full knowledge that he had a claim against Pressprich and that Pressprich was a Stock Exchange member." (453 F.2d at 1212). *The same is not true in the case at bar.* At the time plaintiff entered the employ of defendant KIDDER, PEABODY & COMPANY in August, 1982, no dispute regarding wages existed. Plaintiff proceeded in his employment on the assumption that his employer would act in good faith and deal fairly. Plaintiff was not made aware of the fact that he would be waiving, in advance, certain sacred and fundamental constitutional right, including the rights to judicial relief and trial by jury of his peers. The distinction is critical as the Court in *Coenen* so acknowledged. The opinion in *Coenen* commenced with a discussion of the

landmark case, *Wilko vs. Swan,* 346 U.S. 427 (1953), wherein the High Court held that an agreement to arbitrate a claim arising under the 1933 Security Exchange Act was unenforceable. The *Coenen* case stated:

> "The rationale of the decision [in *Wilko vs. Swan*] was that the agreement was made *before the existence of any controversy, thus restricting plaintiff in his choice of forum before there was any dispute.*"

Coenen, 453 F.2d at 1213 [emphasis added]. The *Coenen* court then cited the following principle of law enunciated in *Wilko vs. Swan:*

> "While the Securities Act does not require a Petitioner to sue, *a waiver in advance of a controversy stands upon a different footing.*"

Coenen, 453 F.2d at 1213, citing *Wilko vs. Swan,* 346 U.S. at 438. Thus, unlike the case at bar, the decision in *Coenen,* was based "squarely on this ground," i.e., "... that the parties *already know* just what they are agreeing to arbitrate ... a *specific existing dispute.*" (453 F. 2d 1209). [Emphasis added.]

In sum, defendants have misapplied the cases they have cited while ignoring the leading and dispositive case on the subject, *Ware, supra.*

In the absence of any discussion — or even mention — of the leading case and statute on the subject and without any affidavit or declaration to support their position, defendants' motion is frivolous.

II

AS A SECOND AND INDEPENDENT GROUND FOR DENYING THE PENDING MOTION, THE PURPORTED AGREEMENT FOR COMPULSORY ARBITRATION IS AN UNENFORCEABLE CONTRACT OF ADHESION WHICH HAS BEEN JUDICIALLY DETERMINED TO BE UNDULY OPPRESSIVE, UNCONSCIONABLE, PRESUMPTIVELY BIASED IN FAVOR OF MANAGEMENT, AND FAILS TO SATISFY THE MINIMUM STANDARDS OF INTEGRITY.

Merrill Lynch, Pierce, Fenner & Smith, Inc., vs. Ware, 414 U.S. 117 (1973); *Hope vs. Superior Court of Santa Clara County,* 122 Cal.App. 3d 147, 175 Cal. Rptr. 851 (1981); *Tonetti vs. Shirley and Kidder Peabody and Company, Inc.,* ____ Cal.App. 3d ____, 85 Daily Journal D.A.R. 585, filed February 19, 1985.

As a separate and distinct ground for denying the pending motion, this Court should be guided by another major ruling that was neither distinguished nor even cited by defendants: *Hope vs. Superior Court of Santa Clara County,* 122 Cal.App. 3d 153, 175 Cal.Rptr. 851 (1981). In *Hope*, the court examined the same issue as it arose in a dispute between certain account executives and their employer, Shearson Hayden, Stone, Inc, and the court ruled that the purported agreement to arbitrate was, in legal effect, a void and unenforceable contract of adhesion. The court observed:

> "Here, as in [*Graham vs.*] *Scissor Tail,* [28 Cal.3d 807, 171 Cal.Rptr. 604 (1981)], the contract containing the arbitration provision was adhesive in nature. It consisted of a standard employment application form, prepared by the New York Stock Exchange, and imposed by Shearson upon all applicants for

employment. Shearson does not claim that petitioners had any options other than "to adhere to the contract or reject it." [Citation] . . . * * * * "We must also conclude on the basis of the standards set forth in *Scissor Tail* that the arbitration provisions contained in the contract were unconscionable, and therefore unenforceable . . . [H]ere, as in *Scissor Tail*, the arbitral body is so associated with a party to the contract, i.e., *Shearson*, as to be presumptively biased in favor of that party. * * * *

". . . this is not to say that members of the board of directors are in fact biased, or that they would necessarily exercise their authority in a consciously biased fashion; it is to say that the structure of governance of the Exchange is such that there exists a *presumptively institutional bias* in favor of member firms and members who constitute the electoral constituency of the board. Petitioners, being outside constituency [Citations] have legitimate cause to complain."

Hope, 122 Cal.App.3d 153-154.

The purported "agreement" for compulsory arbitration constitutes an unenforceable contract of adhesion because (a) the selection of arbitrators is made by the New York Stock Exchange and is presumptively biased in favor of management; and (b) the denial of meaningful pre-trial discovery is unduly oppressive and frustrates an employee's claim for relief.

A. The Selection of Arbitrator by the New York Stock Exchange Is Presumptively Biased in Favor of Management.

In *Hope* the court ruled that the arbitration rules of the New York Stock Exchange are presumptively biased in favor of management and that the structure of govern-

ance of the Exchange is such that there exists a presumptive *institutional* bias in favor of member firms (e.g., corporate-defendant KIDDER PEABODY). (122 Cal.App.3d at 154) The *Hope* Court further ruled that this presumption of bias does not disappear simply because the decisional power is delegated, "*[n]or is the presumption dispelled by rules requiring the arbitrators to be persons not engaged in the securities business or giving the non-member one peremptory challenge, or granting the director of arbitration authority to disqualify an arbitrator.*" (122 Cal.App.3d at 155)

The ruling in *Hope* was reaffirmed in the recent decision involving this same corporate-defendant in *Tonetti v. Shirley and Kidder Peabody & Company, Inc.*, ____ Cal.App.3d ____ (filed February 19, 1985), 85 Daily Journal D.A.R. 585, wherein:

> "*Here, however,* **Kidder** *has failed to sustain its burden of showing the NYSE Constitution and Rules are fair as applied to an employee of a member firm . . .* Because we cannot determine from the record before us whether an employee is protected from the presumption of institutional bias in favor of management, Kidder did not meet its burden of establishing the fairness of the arbitration procedure in the trial court. Consequently, *we conclude the NYSE arbitration procedures 'fail to meet the minimal levels of integrity' required by Scissor-Tail.* Thus, the presumption of institutional bias as established in *Hope* has *not* been rebutted, and the arbitration provisions are *unconscionable* and *unenforceable.*"

(85 Daily Journal D.A.R. at 587)

In the case at bar, defendants have submitted no evidence whatsoever which would prove that the Constitu-

tion and Rules of the New York Stock Exchange are fair as applied to a California wage earner's claim for relief.

B. The Lack of Discovery Available Under The Rules of the New York Stock Exchange are Inherently Unfair.

In the usual and customary course of dealings among account executives and the brokerage house for whom they are employed, virtually all agreements and understandings are oral and based on *trust.* From this sacred trust arises the high standard of fiduciary duty which the law imposes on member-corporations of the Stock Exchange and their employees. In order for an employee in plaintiff's position to have a meaningful opportunity to prepare for trial, there must be access to the instruments of discovery as are available in civil courts, including the taking of depositions and the requesting of the production of documents. The Supreme Court has observed that these instruments of discovery, together with pretrial procedures, *"make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Proctor & Gamble Co.,* 356 U.S. 677, 682-83 (1958) [Emphasis added]. The arbitration procedures which defendants are proffering do not provide for any of the essential tools of discovery which are available in the civil courts.

Said arbitration rules are set forth in Exhibit "C" of defendants' moving papers. At Section 2619, Rule 619(b), these rules state that the parties are only required to "cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration." Under these rules, defendants would have unfettered control over which documents to divulge and which documents to withhold. Said rules, if interpreted literally, would allow defendants to withhold such documents as would, in defendants' opinion, prolong the arbitration even if it brought out the truth, and defendants' decision,

whether capricious or not, would be insulated from judicial scrutiny. This is not due process, and these rules would work nothing but mischief and obstruction upon plaintiff's claim for relief.

Likewise, these arbitration rules do not provide for depositions. A party in plaintiff's position would thereby be denied any meaningful opportunity to prepare for trial. It takes little imagination to realize that, if in fact a conspiracy existed among defendants as alleged in the Complaint, plaintiff would be at a severe disadvantage in contending with adverse witnesses in the absence of the right to take depositions of these witnesses.

In the absence of meaningful discovery, plaintiff would be relegated to trying his case "in the dark," an apt description applied by the High Court to the state of civil litigation prior to the enactment of the federal discovery rules. *Hickman v. Taylor,* 329 U.S. 495, 500 (1947).

The courts have recognized that the instruments of discovery serve to avoid surprise and the possible miscarriage of justice. See Wright & Miller, 8 *Federal Practice & Procedure,* Section 2001 at p. 17. Said risks would be present in the case at bar. The tools of discovery "minimize the chances for and significance of the trick tactic," *Greyhound Corp. v. Superior Court,* 56 C.2d 355, 377, 15 Cal.Rptr. 90 (1961), and, "[i]n this way, it was sought to put an end to the 'sporting theory of justice,' by which the result depends on the fortuitous availability of evidence or the skill and strategy of counsel." *Id.* at p. 18-19.

The arbitration procedures proffered by defendants are an anachronism in the modern legal world, and the pending motion should be soundly rejected on that basis alone.

III

UNDER THE CIRCUMSTANCES OF THIS CASE, ARBITRATION WOULD ENGENDER A MULTIPLICITY OF PROCEEDINGS RATHER THAN CONSERVE JUDICIAL RESOURCES.

The only parties involved in the purported "agreement" to arbitrate any disputes were plaintiff and defendant KIDDER, PEABODY & COMPANY. Defendant BARCLAY PERRY and defendant JAMES JOHNSTON were not parties to any purported "agreement," and thus said purported "agreement" can in no way preempt plaintiff's civil action against the individual defendants, PERRY and JOHNSTON, for compensatory and punitive damages arising from said defendants' acts of conversion, conspiracy to commit conversion, breach of fiduciary duty, and breach of contract.

Defendants, rather than seeking to ease the Court's docket and conserve judicial resources, are proposing that the same cause of action be *litigated twice* and in two separate forums: first, an arbitration proceeding against defendant KIDDER, PEABODY & COMPANY on the limited issues (if any) within the scope of the purported "agreement," and then a *separate civil court trial* against the remaining co-defendants on all remaining counts.

Defendants appear to make no secret of their goal to generate massive amounts of paperwork and to bury plaintiff so deep with improvident motions so as to browbeat him into submission. As further example of defendants' conduct in this regard, defendant KIDDER, PEABODY & COMPANY has brought the identical Motion to Compel Arbitration in the United States District Court for the Central District of California. Thus, rather than having the issue resolved in one forum, defendants are asking instead to have their motion first heard in the

Superior Court of the State of California, then to re-argue the same said Motion in the Federal Court. Such abuse of the legal system deserves swift and firm rejection by this Court.

CONCLUSION

WHEREFORE, for all the reasons stated herein, it is respectfully submitted that there is no merit to the pending motions, and it is hereby requested the said motions be denied.

DATED: March 28, 1985

JULIAN B. FENSTEN
A PROFESSIONAL CORPORATION

By BRUCE GELBER

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 700 So. Flower Street, 22nd Floor, Los Angeles, CA 90017. On March 29, 1984, I served the within Memorandum of Points and Authorities of Plaintiff Kenneth Morgan Thomas in Opposition to Defendants' Motion to Compel Arbitration and in Opposition to Defendants' Motion to Stay Proceedings on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, CA, addressed as follows:

Overton, Lyman & Prince
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

Attention: Maren E. Nelson

Executed on March 29, 1985 at Los Angeles, California

I declare, under penalty of perjury, that the foregoing is true and correct.

DIANE PHILLIPS
Signature

Case No. C 529 105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,
vs.
KIDDER, PEABODY & COMPANY, INCORPORATED,
Defendants.

DECLARATION OF KENNETH MORGAN THOMAS IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Date: April 5, 1985
Time: 9:00 a.m.
Place: Dept. 81

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss:

I, KENNETH MORGAN THOMAS, declare and state as follows:

1. I am the Plaintiff in the above-entitled civil action for the recovery of unpaid wages. I have personal knowledge of the facts stated herein and can and will testify competently thereto if called as a witness.

2. I make this Declaration in opposition to the motion by defendants to compel arbitration and to stay proceedings now pending in this Court.

3. The underlying civil action concerns wages which have accrued, are unpaid, and which are due to me by reason of my employment for defendant KIDDER, PEABODY. Defendants have refused to pay these wages (my earned commissions as an account executive for

KIDDER, PEABODY & COMPANY), and tne manner in which they refused to pay my wages was arbitrary, oppressive, harassing and vexatious.

4. Prior to February 15, 1985, I was unaware of any alleged agreement between defendant KIDDER, PEABODY and myself to arbitrate under the rules of the New York Stock Exchange any dispute as to the payment of wages which were due and owing and yet unpaid. On or about said date, I was contacted by one of my attorneys, Bruce Gelber of the law offices of Julian B. Fensten, who advised me that a letter had been received from the attorneys for KIDDER, PEABODY, wherein the claim was made that I had agreed in August, 1982, to arbitrate this claim. Your Declarant had never been advised by anyone, including defendants KIDDER, PEABODY, BARCLAY PERRY and JAMES JOHNSTON, of the existence of any such agreement to arbitrate any claim for unpaid wages. I was never advised that I would be required in advance of any dispute with defendant to waive certain of my Constitutional rights, including my right to a civil trial, nor was I advised that I would be required to have this matter arbitrated by arbitrators who share a close affinity with the corporate-defendant herein, arising from the fact that the selection of arbitrators is made by the New York Stock Exchange, of which defendant KIDDER, PEABODY is a member.

Executed this 29th day of March, 1985, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

KENNETH MORGAN THOMAS

Kenneth Morgan Thomas

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 700 So. Flower Street, 22nd Floor, Los Angeles, CA 90017. On March 29, 1984, I served the within Declaration of Kenneth Morgan Thomas in Opposition to Defendants' Motion to Compel Arbitration and Stay Proceedings on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, CA addressed as follows:

Overton, Lyman & Prince
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

Attention: Maren E. Nelson

Executed on March 29, 1985 at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

DIANE PHILLIPS

Signature

Case No. C529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff

vs.

KIDDER PEABODY & CO.,
BARCLAY PERRY, JAMES JOHNSTON,

Defendants.

REPLY MEMORANDUM OF DEFENDANTS AND PETITIONERS BARCLAY PERRY AND JAMES JOHNSTON IN SUPPORT OF PETITION FOR ORDER COMPELLING ARBITRATION AND MOTION FOR ORDER STAYING PROCEEDINGS

Date: April 5, 1985
Time: 9:00 a.m.
Place: Dept. 81
Original Filed Apr. 3, 1985.

Defendants and Petitioners Barclay Perry ("Perry") and James Johnston ("Johnston") hereby reply to the Memorandum of Points and Authorities of Plaintiff Kenneth Morgan Thomas in Opposition to Defendants' Motion To Compel Arbitration and In Opposition to Defendants' Motion for Order Staying Proceedings ("Opposition") which was served by mail on March 29, 1985 and received by counsel for Perry and Johnston on April 1, 1985.

1. WARE DOES NOT APPLY TO EITHER PERRY OR JOHNSTON

In his Opposition, plaintiff Kenneth Morgan Thomas ("Thomas") relies heavily on *Merrill Lynch, Pierce, Fenner & Smith Inc. vs. Ware*, 414 U.S. 117, 94 S. Ct. 383 (1973) which he contends is "on all fours" with the present action. That contention is seriously misplaced because:

(1) Thomas has asserted no California Labor Code claim against either Perry or Johnston;

(2) Neither Perry nor Johnston was the "employer" of Thomas; and

(3) Defendant Kidder Peabody & Co., Incorporated ("Kidder Peabody") has neither petitioned this Court for an order compelling arbitration nor moved this Court for an order staying proceedings.

Whatever may be the applicability of *Ware* to Kidder Peabody, (a question which will be determined by the United States District Court for the Central District of California in an action which is now pending in that court), it clearly has no applicability to either Perry or Johnston.

2. WARE HAS BEEN SUPERCEDED BY KEATING

In *Southland Corporation v. Keating*, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), the United States Supreme Court stated:

> "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (79 L. Ed. 2d 15)

The statute in question in *Keating* was California Corporation Code § 31512 which the California Supreme Court interpreted to require judicial consideration of claims brought under the state statute (similar to the Labor Code) and accordingly refused to enforce the parties' contract to arbitrate such claims (see *Keating* at 11). The United States Supreme Court went on to state that:

> "So interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." (79 L. Ed. 2d 11)

California Labor Code § 229 likewise directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.

3. THE UNITED STATES SUPREME COURT REAFFIRMED THE APPLICABILITY OF THE FEDERAL ARBITRATION ACT ON MARCH 4, 1985 IN DEAN WITTER REYNOLDS V. BYRD

In *Dean Witter Reynolds, Inc. vs. A. Lamar Byrd*, a copy of which is attached hereto as Exhibit "A", the United States Supreme Court decided, on March 4, 1985, stated, in paragraph III,

> "The Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. *By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.* §§ 3-4. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement." [Emphasis added]

Whatever may have been the view of the United States Supreme Court twelve years ago in *Ware*, it is clear from the trilogy of *Moses H. Cone*, *Keating*, and *Byrd* that neither state courts nor state legislatures may impose conditions or create exceptions to the application to the Federal Arbitration Act. To the extent that *Hope* or *Tonetti* are inconsistent with *Byrd*, they are overruled.

As regards *Tonetti*, the Court of Appeal has granted a rehearing and a copy of the Order for Rehearing is attached hereto as Exhibit "B".

4. CONCLUSION

In his Opposition, Thomas has cited a number of cases in order to escape the effect of the Federal Arbitration Act. It is submitted that this substantial effort is to no avail because he does not avoid either *Moses H. Cone* or *Keating* or *Byrd*. Furthermore, virtually none of the cases relied upon by Thomas have any applicability to his claims against either Perry or Johnston. The arbitrability of his claims against Kidder Peabody are not before this court and his arguments with respect thereto have no relevance to his claims against either Perry or Johnston. For the foregoing reasons, it is urged that the Petition and Motion of Perry and Johnston be granted; that the claims asserted by Thomas in his Complaint against Perry and Johnston be submitted to arbitration in accordance with the Constitution and Rules of the New York

Stock Exchange, Inc.; and that all proceedings in this court be stayed pending such arbitration.

DATED: April 3, 1985

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By Peter Brown Dolan
Attorneys for Defendants
Kidder Peabody & Co.,
Incorporated,
Barclay Perry
and James Johnston

EXHIBIT A

No. 83-1708

DEAN WITTER REYNOLDS INC., PETITIONER
v. A. LAMAR BYRD

U.S. SUPREME COURT OPINIONS IN DEAN WITTER REYNOLDS, INC. v. BYRD

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Syllabus

No. 83-1708. Argued December 4, 1984 — Decided March 4, 1985

In 1981, respondent invested $160,000 in securities through petitioner broker-dealer. The parties had a written agreement to arbitrate any disputes that might arise out of the account. Thereafter, the value of the account declined by more than $100,000. Respondent then filed an action against petitioner in Federal District Court, alleging violations of the Securities Exchange Act of 1934 and of various state-law provisions. Petitioner filed a motion to compel arbitration of the pendent state claims under the parties' agreement and to stay arbitration pending resolution of the federal action. Petitioner argued that the Federal Arbitration Act — which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract" — required the District Court to compel arbitration of the state claims. The District Court denied the motion, and the Court of Appeals affirmed.

Held: The District Court erred in refusing to grant petitioner's motion to compel arbitration of the state claims.

(a) The Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums. By its terms, the Act leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. The Act's legislative history establishes that its principal purpose was to ensure judicial enforcement of privately made arbitration agreements, and not to promote the expeditious resolution of claims. By compelling arbitration of state-law claims, a district court successfully protects the parties' contractual rights and their rights under the Arbitration Act.

(b) Neither a stay of arbitration proceedings nor joined proceedings is necessary to protect the federal interest in the federal-court proceeding. The formulation of collateral-estoppel rules affords adequate protection to that interest.

726 F. 2d 552, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion.

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether, when a complaint raises both federal securities claims and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims despite the parties' agreement to arbitrate their disputes. We granted certiorari to resolve a conflict among the Federal Courts of Appeals on this question. 467 U. S.____(1984).

I

In 1981, A. Lamar Byrd sold his dental practice and invested $160,000 in securities through Dean Witter Reynolds, Inc., a securities broker-dealer. The value of the account declined by more than $100,000 between September 1981 and March 1982. Byrd filed a complaint against Dean Witter in the United States District Court for the Southern District of California, alleging a violation of §§ 10(b), 15c, and 20 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78j(b), 78o(c), and 78t, and of various state-law provisions. Federal jurisdiction over the state-law claims was based on diversity of citizenship and the principle of pendent jurisdiction. In the complaint, Byrd alleged that an agent of Dean Witter had traded in his account without his prior consent, that the number of transactions executed on behalf of the account was excessive, that misrepresenations were made by an agent of Dean Witter as to the status of the account, and that the agent acted with Dean Witter's knowledge, participation, and ratification.

When Byrd invested his funds with Dean Witter in 1981, he signed a Customer's Agreement providing that "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration." App. to Pet. for Cert. 11. Dean Witter accordingly filed a motion for an order severing the pendent state claims, compelling their arbitration, and staying arbitration of those claims pending resolution of the federal court action. App. 12. It argued that the Federal Arbitration Act (Arbitration Act or Act), 9 U. S. C. §§ 1-14, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," § 2, required that the District Court compel arbitration of the state law claims. The Act

authorizes parties to an arbitration agreement to petition a federal district court for an order compelling arbitration of any issue referable to arbitration under the agreement. §§ 3, 4. Because Dean Witter assumed that the federal securities claim was not subject to the arbitration provision of the contract and could be resolved only in the federal forum, it did not seek to compel arbitration of that claim.[1] The District Court denied in its entirety the

[1]In *Wilko v. Swan*, 346 U. S. 427 (1953), this Court held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77l(2), was not enforceable. The Court pointed to language in § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, which declares "void" any "stipulation" waiving compliance with any "provision" of the Securities Act, and held that an agreement to arbitrate amounted to a stipulation waiving the right to seek a judicial remedy, and was therefore void. 346 U. S., at 434-435. Years later, in *Scherk v. Alberto Culver Co.*, 417 U. S. 506 (1974), this Court questioned the applicability of *Wilko* to a claim arising under § 10(b) of the Securities Exchange Act of 1934, or under Rule 10b-5, because the provisions of the 1933 and 1934 Acts differ, and because, unlike § 12(2) of the 1933 Act, § 10(b) of the 1934 Act does not expressly give rise to a private cause of action. 417 U. S., at 512-513. The Court did not, however, hold that *Wilko* would not apply in the context of a § 10(b) or Rule 10b-5 claim, and *Wilko* has retained considerable vitality in the lower federal courts. Indeed, numerous District Courts and Courts of Appeals have held that the *Wilko* analysis applies to claims arising under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and that agreements to arbitrate such claims are therefore unenforceable. See, *e. g.*, *DeLancie v. Birr. Wilson & Co.*, 648 F. 2d 1255, 1258-1259 (CA9 1981); *Merrill Lynch, Pierce, Fenner & Smith, v. Moore*, 590 F.2d 823, 827-829 (CAIO 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith*, 558 F. 2d 831, 833-835 (CA7 1977); *Sibley* v. *Tandy Corp.*, 543 F. 2d 540, 543, and n. 3 (CA5 1976), cert. denied, 434 U. S. 824 (1977); see also Brief for Petitioner 4, n. 3 (citing cases); Brief for Securities Industry Association, Inc., et al. as *Amici Curiae* 10, n. 7 (same).

Dean Witter and *amici* representing the securities industry urge us to resolve the applicability of *Wilko* to claims under § 10(b) and

motion to sever and compel arbitration of the pendent state claims, and on an interlocutory appeal the Court of Appeals for the Ninth Circuit affirmed. 726 F. 2d 552 (1984).

II

Confronted with the issue we address[2] — whether to compel arbitration of pendent state-law claims when the federal court will in any event assert jurisdiction over a federal-law claim — the Federal Courts of Appeals have adopted two different approaches. Along with the Ninth Circuit in this case, the Fifth and Eleventh Circuits have relied on the "doctrine of intertwining." When arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court.[3] These courts acknowledge the strong federal policy in favor of enforcing arbitration agreements but offer two reasons why the district courts nevertheless should decline to compel arbitration in this situation. First, they assert that such a result is necessary to preserve what they consider to be

Rule 10b-5. We decline to do so. In the District Court, Dean Witter did not seek to compel arbitration of the federal claims. Thus, the question whether *Wilko* applies to § 10(b) and Rule 10b-5 claims is not properly before us.

[2]Respondent Byrd also argues that as a contract of adhesion this arbitration agreement is subject to close judicial scrutiny, and that it should not routinely be enforced. Byrd did not present this argument to the courts below, and we decline to address it in the first instance. We therefore express no view on the merits of the argument.

[3] See *Belks v. Merrill, Lynch, Pierce, Fenner & Smith*, 693 F. 2d 1023 (CA11 1982); *Miley v. Oppenheimer & Co.*, 637 F. 2d 318, 334-337 (CA5 1981); see also *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F. Supp. 578 (ED Cal. 1982).

the court's exclusive jurisdiction over the federal securities claim; otherwise, they suggest, arbitration of an "intertwined" state claim might precede the federal proceeding and the factfinding done by the arbitrator might thereby bind the federal court through collateral estoppel. The second reason they cite is efficiency; by declining to compel arbitration, the court avoids bifurcated proceedings and perhaps redundant efforts to litigate the same factual questions twice.

In contrast, the Sixth, Seventh and Eighth Circuits have held that the Federal Arbitration Act divests the district court of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so. These courts conclude that the Act, both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and "not substitute [its] own views of economy and efficiency" for those of Congress. *Dickinson v. Heinold Securities, Inc.*, 661 F. 2d 638, 646 (CA7 1981).[4]

We agree with these latter courts that the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. Accordingly, we reverse the decision not to compel arbitration.

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[4]See also *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F. 2d 59 (CA8 1984); *Liskey v. Oppenheimer & Co.*, 717 F. 2d 314 (CA6 1983).

III

The Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3-4. Thus, insofar as ths language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

It is suggested, however, that the Act does not expressly address whether the same mandate — to enforce arbitration agreements — holds true where, as here, such a course would result in bifurcated proceedings if the arbitration agreement is enforced.[5] Because the Act's

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[5]Bifurcated proceedings might be the result in several kinds of cases involving securities transactions. For example, since this Court's decision in *Wilko v. Swan*, see n. 1, *supra*, claims arising under § 12(2) of the Securities Act of 1933 may not be resolved through arbitration, and when a court is confronted with a § 12(2) claim, pendent state claims, and a motion to compel arbitration, bifurcated proceedings might result. If *Wilko* applies to claims arising under other provisions of the Securities Acts, the same situation would arise. Also, when as here a federal securities claim and pendent state-law claims are filed and a party to the arbitration agreement asks only that the district court compel arbitration only of the pending state claims, the prospect of a bifurcated proceeding arises.

Finally, federal courts have addressed the same issue when confronted with federal antitrust actions and pendent state claims. See, *e.g., Lee v. Ply®Gem Industries, Inc.*, 593 F. 2d 1266, 1274-1275, and n. 67 (CADC), cert. denied, 441 U.S. 967 (1979) (holding that arbitra-

drafters did not explicitly consider the prospect of bifurcated proceedings, we are told, the clear language of the Act might be misleading. Thus, courts that have adopted the view of the Ninth Circuit is this case have argued that the Act's goal of speedy and efficient decisionmaking is thwarted by bifurcated proceedings, and that, given the absence of clear direction on this point, the intent of Congress in passing the Act controls and compels a refusal to compel arbitration. They point out, in addition, that in the past the Court on occasion has identified a contrary federal interest sufficiently compelling to outweigh the mandate of the Arbitration Act, see n. 1, *supra,* and they conclude that the interest in speedy resolution of claims should do so in this case. See, *e.g., Miley v. Oppenheimer & Co.,* 637 F.2d 318, 336 (CA5 1981); *Cunningham v. Dean Witter Reynolds, Inc.,* 550 F.Supp. 578, 585 (ED Cal. 1982).

We turn, then, to consider whether the legislative history of the Act provides guidance on this issue. The congressional history does not expressly direct resolution of the scenario we address. We conclude, however, on consideration of Congress' intent in passing the statute, that a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made.

The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement — upon the motion of one of the parties — of privately

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ble claims should not become subject to adjudication in court merely because they are related to nonarbitrable claims, when the dispute arises out of a contract containing an agreement to arbitrate).

negotiated arbitration agreements. The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.[6] This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it, the House Report expressly observed:

> "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." *Id.,* at 2.

Nonetheless, passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements

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[6]According to the Report:

"The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).

See also Cohn & Dayton, The New Federal Arbitration Act, 12 Va. L. Rev. 265, 283-284 (1926).

into which parties had entered,[7] and must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement," *id.*, at 20. See also *id.*, at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act — enforcement of private agreements and encouragement of efficient and speedy dispute resolution — must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute. See n. 1, *supra*. By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.

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[7]See also 65 Cong. Rec. 1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts").

IV

It is also suggested, however, and some Courts of Appeals have held, that district courts should decide arbitrable pendent claims when a nonarbitrable federal claim is before them, because otherwise the findings in the arbitration proceeding might have collateral-estoppel effect in a subsequent federal proceeding. This preclusive effect is believed to pose a threat to the federal interest in resolution of securities claims, and to warrant a refusal to compel arbitration.[8] Other courts have held that the claims should be separately resolved, but that this preclusive effect warrants a stay of arbitration proceedings pending resolution of the federal securities claim.[9] In this case, Dean Witter also asked the District Court to stay the arbitration proceedings pending resolution of the federal claim, and we suspect it did so in response to such holdings.

We believe that the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest, and that the consequence of this misconception has been the formulation of unnecessarily contorted procedures. We conclude that neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal-court proceeding, and that the formulation of collateral-estoppel rules affords adequate protection to that interest.

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[8]See *e.g.*, *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F. 2d, at 1026; *Miley v. Oppenheimer & Co., Inc.*, 637 F. 2d, at 336; *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F. Supp., at 582.

[9]See, *e.g.*, *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F. 2d, at 62-63; *Dickinson v. Heinold Securities, Inc.*, 661 F. 2d 638, 644 (CA7 1981); see also *Liskey v. Oppenheimer & Co.*, 717 F. 2d, at 318 (discussing Dickinson).

Initially, it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of non-arbitrable federal claims. Just last Term, we held that neither the full faith and credit provision of 28 U.S.C. § 1738, nor a judicially fashioned rule of preclusion, permit a federal court to accord res judicata or collateral-estoppel effect to an unappealed arbitration award in a case brought under 42 U.S.C. § 1983. *McDonald v. City of West Branch,* 466 U.S. — (1984). The full faith and credit statute requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment, and since arbitration is not a judicial proceeding, we held that the statute does not apply to arbitration awards. *Id.*, at . The same analysis inevitably would apply to any unappealed state arbitration proceedings. We also declined, in *McDonald*, to fashion a federal common-law rule of preclusion, in part on the ground that arbitration cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. We therefore recognized that arbitration proceedings will not necessarily have a preclusive effect on subsequent federal-court proceedings.

Significantly, *McDonald* also establishes that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding. Since preclusion doctrine comfortably plays this role, it follows that neither a stay of the arbitration proceedings, nor a refusal to compel arbitration of state claims, is *required* in order to assure that a precedent arbitration does not impede a subsequent federal-court action. The Courts of Appeals that have assumed collateral-estoppel effect must be given to arbitration proceedings have therefore sought to accomplish indirectly that which they erroneously assumed they could not do directly.

The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us, however, and we do not decide it. The collateral-estoppel effect of an arbitration proceeding is at issue only after arbitration is completed, of course, and we therefore have no need to consider now whether the analysis in *McDonald* encompasses this case. Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection. As a result, there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of federal interests.

Finding unpersuasive the arguments advanced in support of the ruling below, we hold that the District Court erred in refusing to grant the motion of Dean Witter to compel arbitration of the pendent state claims. Accordingly, we reverse the decision of the Court of Appeals insofar as it upheld the District Court's denial of the motion to compel arbitration, and we remand for further proceedings in accordance with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I join the Court's opinion. I write separately only to add a few words regarding two issues that it leaves undeveloped.

The premise of the controversy before us is that respondent's claims under the Securities Exchange Act of 1934 are not arbitrable, notwithstanding the contrary agreement of the parties. The Court's opinion rightly concludes that the question whether that is so is not before us. *Ante*,

at 1, n. 1. Nonetheless, I note that this is a matter of substantial doubt. In *Wilko v. Swann*, 346 U. S. 427 (1953), the Court held arbitration agreements unenforceable with regard to claims under § 12(2) the 1933 Act. It relied on three interconnected statutory provisions: § 14 of the Act, which voids any "stipulation . . . binding any person acquiring any security to waive compliance with any provision" of the Act; § 12(2), which, the Court noted, creates "a special right to recover for misrepresentation which differs substantially from the common-law action"; and § 22, which allows suit in any state or federal court of competent jurisdiction and provides for nationwide service of process. 346 U. S., at 431, 434-435; 15 U. S. C. §§ 77n, 77l(2), 77v.

Wilko's reasoning cannot be mechanically transplanted to the 1934 Act. While § 29 of that Act, 15 U. S. C. § 78cc(a), is equivalent to § 14 of the 1983 Act, counterparts of the other two provisions are imperfect or absent altogether. Jurisdiction under the 1934 Act is narrower, being restricted to the federal courts. 15 U. S. C. § 78aa. More important, the cause of action under § 10(b) and Rule 10b-5, involved here, is implied rather than express. See *Herman & MacLean v. Huddleston*, 459 U. S. 375, 380, and nn. 9-10 (1983). The phrase "waive compliance with any *provision of this chapter*," 15 U. S. C. § 78cc(a) (emphasis added), is thus literally inapplicable. Moreover *Wilko's* solicitude for the federal cause of action — the "special right" established by Congress, 346 U. S., at 431 — is not necessarily appropriate where the cause of action is judicially implied and not so different from the common law action.*

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*The 1934 Act does not explicitly provide a private right of action to victims of certain illegal conduct. See §§ 9, 16, 18, 15 U. S. C. §§ 78i, 78p, 78r. None of those sections is relied on by respondent.

The Court has expressed these reservations before. *Scherk v. Alberto-Culver Co.*, 417 U. S. 506, 513-514 (1974). I reiterate them to emphasize that the question remains open and the contrary holdings of the lower courts must be viewed with some doubt.

The Court's opinion makes clear that a District Court should not stay arbitration, or refuse to compel it at all, for fear of its preclusive effect. And I can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit. Belated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it all all, nonetheless significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement. In addition, once it is decided that the two proceedings are to go forward independently, the concern for speedy resolution suggests that neither should be delayed. While the impossibility of the lawyers being in two places at once may require some accommodation in scheduling, it seems to me that the heavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course. And while the matter remains to be determined by the District Court, I see nothing in the record before us to indicate that arbitration in the present case should be stayed.

EXHIBIT B

G000455

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

LOUIS TONETTI,
Plaintiff and Respondent,

v.

STEPHEN L. SHIRLEY AND
KIDDER, PEABODY & COMPANY, INC.,
Defendants and Appellants.

(Super. Ct. No. 39-75-80)

ORDER GRANTING REHEARING

Court Of Appeal — 4th Dist. Filed March 21, 1985.

THE COURT:

The petition of defendants and appellants Stephen L. Shirley and Kidder, Peabody & Co., Inc. for rehearing is granted.

The declaration of Morris filed with the petition is stricken as an improper attempt to augment the record and will not be considered on rehearing.

The parties are invited to brief the following issues:

1. Whether the doctrine of federal preemption renders state adhesion contract principles irrelevant, requiring us to look solely to federal law;

2. Whether the NYSE arbitration procedures applicable to nonmembers are unconscionable under federal law; and

3. Whether, on remand, the trial court should be given the authority to appoint a neutral arbitrator on petition of either party.

Appellants' opening brief shall be filed by April 22, 1985. Repondent's brief and appellants' reply brief shall be filed within the times prescribed by rule 16, subdivision (a), California Rules of Court.

/s/ WALLIN
Wallin, J.

WE CONCUR:

/s/ TROTTER
Trotter, P. J.

/s/ CROSBY
Crosby, J.

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, 6th Floor, Los Angeles, CA 90071.

On April 3, 1985, I served the foregoing document described as Reply Memorandum of Defendants and Petitioners Barclay Perry and James Johnston In Support of Petition for Order Compelling Arbitration and Motion for Order Staying Proceedings the interested party in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

BRUCE GELBER, ESQ.
Law Offices of Julian B. Fensten
700 South Flower Street, 22nd Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on April 3, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , , 19 , at , California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

SANDY ARD	/s/
Type or Print Name	Signature

Case No. C 529105

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
DEPT. 81

KENNETH MORGAN THOMAS
vs
KIDDER PEABODY & Co., etc., et al.

April 10, 1985

Honorable Robert H. O'Brien, Judge

I. Brown, Deputy Clerk

ORDER

Motion of defendants Kidder, Peabody & Co., Inc., Barclay Perry and James Johnston for order staying proceedings and for order compelling arbitration.

In this matter heretofore taken under submission, the Court now rules as follows:

Motion is denied.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware 414 U.S. 117 is the controlling authority here. *Southland Corp. v. Keating* related to Corporation Code Sect. 31512, part of the California Franchise Investment Law and *Dean Witter v. Byrd* concerned federal securities claims by a customer against a securities broker. Neither case involved California's "strong policy of protecting its wage earners . . . from undesirable economic pressures", as in *Ware.*

Counsel for responding party to give notice.

Counsel notified by U.S. mail.

Case No. C 529 105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

vs.

KIDDER, PEABODY & Co., et al.,
Defendants.

NOTICE OF RULING RE DEFENDANTS' MOTION FOR ORDER STAYING PROCEEDINGS AND FOR ORDER COMPELLING ARBITRATION

TO THE DEFENDANTS KIDDER, PEABODY & CO., BARCLAY PERRY, AND JAMES JOHNSTON, AND TO OVERTON, LYMAN & PRINCE AND PETER BROWN DOLAN, THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the motion of Defendants KIDDER, PEABODY & CO., INC., BARCLAY PERRY, and JAMES JOHNSTON for order staying proceedings and the motion of Defendants BARCLAY PERRY and JAMES JOHNSTON for order compelling arbitration which came on regularly for hearing on April 5, 1985, in Department 81 before the Honorable Robert H. O'Brien, Judge presiding, were denied.

The said motions were denied on the basis that *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 is the controlling authority in connection with the motions made by said Defendants. The court also specifically finds that *Southland Corp. v. Keating* related to Corporations Code § 31512, part of the California Franchise Investment Law, and *Dean Witter v. Byrd* concerned federal

securities claims by a customer against a securities broker and therefore neither of these cases cited by Defendants involved California's "strong policy of protecting its wage earners . . . from undesirable economic pressures" as in the *Ware* case *supra.*

DATED: April 12, 1985.

JULIAN B. FENSTEN
A Professional Corporation

By JULIAN B. FENSTEN,
Attorney for Plaintiff

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 South Flower, 22nd Floor, Los Angeles, CA 90017

On April 12, 1985, I served the foregoing document described as NOTICE OF RULING RE DEFENDANTS' MOTION FOR ORDER STAYING PROCEEDINGS AND FOR ORDER COMPELLING ARBITRATION on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles
addressed as follows:

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee. Executed on April 12, 1985 at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

PHYLLIS WINSLOW
Signature

Case No. 529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

vs.

KIDDER PEABODY & CO., BARCLAY PERRY,
JAMES JOHNSTON,
Defendants.

REQUEST FOR STATEMENT OF DECISION
[C.C.P. § 1291]
Original Filed April 16, 1985.

Pursuant to C.C.P. §§ 632 and 1291, defendants and petitioners Barclay Perry and James Johnston hereby request a Statement of Decision as to the following controverted issues:

(a) Whether the claim for Conversion alleged in the Complaint is an "action to enforce the provisions of (Article 1 of Chapter 1 of Part 1 of Division 2 of the California Labor Code) for the collection of due and unpaid wages claimed by an individual" as described in California Labor Code § 229.

(b) Whether the claim for Conversion alleged in the Complaint is a "dispute, claim or controversy that arose between plaintiff Kenneth Morgan Thomas ("Thomas") and his firm (defendant Kidder Peabody & Co., Incorporated — hereinafter "Kidder Peabody") or any other person (defendants Barclay Perry — hereinafter "Perry" and James Johnston — hereinafter "Johnston").

(c) Whether the claim for Conversion alleged in the Complaint is a "controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization" as set forth in Rule 347 of the New York Stock Exchange Inc. ("NYSE").

(d) Whether the claim for Conspiracy to Commit Conversion alleged in the Complaint is an "action to enforce the provisions of (Article 1 of Chapter 1 of Part 1 of Division 2 of the California Labor Code) for the collection of due and unpaid wages claimed by an individual" as described in California Labor Code § 229.

(e) Whether the claim for Conspiracy to Commit Conversion alleged in the Complaint is a "dispute, claim or controversy that arose between" Thomas and Kidder Peabody or Perry or Johnston.

(f) Whether the claim for Conspiracy to Commit Conversion alleged in the Complaint is a "controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization" as set forth in Rule 347 of the NYSE.

(g) Whether the claim for Breach of Fiduciary Duty alleged in the Complaint is an "action to enforce the provisions of (Article 1 of Chapter 1 of Part 1 of Division 2 of the California Labor Code) for the collection of due and unpaid wages claimed by an individual" as described in California Labor Code § 229.

(h) Whether the claim for Breach of Fiduciary Duty alleged in the Complaint is a "dispute, claim or contro-

versy that arose between" Thomas and Kidder Peabody or Perry or Johnston.

(i) Whether the claim for Breach of Fiduciary Duty alleged in the Complaint is a "controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization" as set forth in Rule 347 of the NYSE.

(j) Whether the claim for Breach of Contract alleged in the Complaint is an "action to enforce the provisions of (Article 1 of Chapter 1 of Part 1 of Division 2 of the California Labor Code) for the collection of due and unpaid wages claimed by an individual" as described in California Labor Code § 229.

(k) Whether the claim for Breach of Contract alleged in the Complaint is a "dispute, claim or controversy that arose between" Thomas and Kidder Peabody or Perry or Johnston.

(l) Whether the claim for Breach of Contract alleged in the Complaint is a "controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization" as set forth in Rule 347 of the NYSE.

(m) Whether the claim for Exemplary and Punitive Damages alleged in the Complaint is an "action to enforce the provisions of (Article 1 of Chapter 1 of Part 1 of Division 2 of the California Labor Code) for the collection of due and unpaid wages claimed by an individual" as described in California Labor Code § 229.

(n) Whether the claim for Exemplary and Punitive Damages alleged in the Complaint is a "dispute, claim or controversy that arose between" Thomas and Kidder Peabody or Perry or Johnston.

(o) Whether the claim for Exemplary and Punitive Damages alleged in the Complaint is a "controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization" as set forth in Rule 347 of the NYSE.

(p) Whether actions to enforce the payment of wages, as contemplated by California Labor Code § 229, are limited to an action by an employee against an employer.

(q) Whether Perry was the employer of Thomas.

(r) Whether Johnston was the employer of Thomas.

(s) Whether California Labor Code § 229 applies to any action by Thomas against either Perry or Johnston.

(t) Whether the defense to arbitration found in California Labor Code § 229 is a ground that exists at law or in equity "for the revocation of any contract" or merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Labor Code, as distinguished by the United States Supreme Court in *Southland Corp. v. Keating* (1984) 79 L.Ed. 2d 1, at 16, fn. 11.

(u) Whether California Labor Code § 229 sets forth a state policy of providing special protection for employees which can be recognized without impairing the basic purposes of the federal Arbitration Act.

(v) Whether the California Legislature, in adopting § 229 of the California Labor Code, could create an

exception to § 2 of the federal Arbitration Act (9 U.S.C. § 2).

(w) Whether the validity of California Labor Code § 229 established in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware* (1973) 414 U.S. 117, 33 L.Ed.2d 348, 94 S.Ct. 383, was overruled by the United States Supreme Court in *Keating, supra.*

(x) Whether the statement by the United States Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd* (March 4, 1985), No. 83-1708 (copy of opinion attached to Reply Memorandum herein) that "by its terms, the (federal Arbitration) Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed" requires this Court to grant the Petition of Perry and Johnston, notwithstanding the provisions of California Labor Code § 229.

(y) Whether "actions to enforce the provisions of this article . . ." referred to in California Labor Code § 229 refers only to actions initiated by the Division of Labor Law Enforcement (as authorized by § 217) or the District Attorney of any county or prosecuting attorney of any city (as authorized by § 218) rather than a civil action initiated by a private litigant such as Thomas.

(z) Whether the Complaint herein, or any cause of action asserted therein, is governed by California Labor Code § 229.

(aa) Whether the Complaint herein, or any cause of action asserted therein, is governed by the federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

(bb) Whether the Complaint herein, or any cause of action asserted therein, is governed by the California Arbitration Act, C.C.P. § 1280, *et seq.*

Dated: April 16, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

BY PETER BROWN DOLAN
Attorneys for Defendants
Kidder, Peabody & Co.
Incorporated,
Barclay Perry and
James Johnston

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California.

On April 16, 1985, I served the foregoing document described as "Request For Statement Of Decision" [C.C.P. § 1291], on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JULIAN B. FENSTEN, A Professional Corporation
BRUCE GELBER, ESQ.
700 South Flower Street, 22nd Floor
Los Angeles, California 90017

☒ (By Mail) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on April 16, 1985, at Los Angeles, California.

☐ (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at , California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL
Type or Print Name

/s/
Signature

Case No. 529105

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff
vs.
KIDDER, PEABODY & CO.,
BARCLAY PERRY, and
JAMES JOHNSTON,
Defendants.

OBJECTION TO DEFENDANTS' REQUEST FOR STATEMENT OF DECISION

Date Matter
Heard: April 5, 1985
Time: 9:00 a.m.
Place: Department 81

Plaintiff KENNETH MORGAN THOMAS hereby objects to the Request for Statement of Decision filed by defendants BARCLAY PERRY and JAMES JOHNSTON, and said objection is made on the following grounds:

1. Under C.C.P. § 632, a request for statement of decision must be made "*within 10 days after the court announces a tentative decision . . .*" Defendants' counsel was fully aware of the tentative decision on *April 5, 1985,* when this matter came on for hearing. (The tentative ruling was, in fact, available by telephone on April 4, 1985.) It was not until *April 16, 1985,* that defendants filed their Request for Statement of Decision, wherein defendants made demand upon this Court to respond to some 28 detailed inquiries. Said Requests by defendants contain misstatements of law (i.e., at paragraph (y) of

the said Requests, defendants delete reference to the portion of *Labor Code* § 218 which states: "*Nothing in this article shall limit the right of any wage claimant to sue directly . . . for any wages or penalty due him under this article.*") Defendants' Request for Decision, filed *eleven* days after the tentative ruling was known, is fatally defective for failure to comply with the time constraints (the ten-day rule) imposed by C.C.P. § 632.

2. Defendant PERRY and defendant JOHNSTON have no standing to request a Statement of Decision since they were not parties to the purported "arbitration agreement" and, therefore, have no standing to seek an order to compel arbitration, nor to appeal the court's ruling, nor to request a Statement of Decision.

3. The applicable statutes, Section 632 and Section 1291 of the California *Code of Civil Procedure,* expressly apply only to the trial of a *question of fact* by the Court. In the case at bar, no question of fact was raised, nor did defendants file any affidavits or declarations regarding any disputed facts.

4. The legal basis for the Court's ruling was set forth in clear and concise language in the Minute Order:

> "*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 is the controlling authority here. *Southland Corp. vs. Keating* related to the Corporation Code Sect. 31512, part of the California Franchise Investment Law and *Dean Witter v. Byrd* concerned federal securities claims by a customer against a securities broker. Neither case involved California's 'strong policy of protecting its wage earners . . . from undesirable economic pressures', as in *Ware*".

Defendants have no cause to demand a further statement of the Court's decision.

DATED: April 18, 1985

Respectfully submitted,

JULIAN B. FENSTEN
A Professional Corporation

By BRUCE GELBER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower St., Suite 2200, Los Angeles, CA 90017.

On April 1985, I served the foregoing document described as OBJECTION TO DEFENDANTS' REQUEST FOR STATEMENT OF DECISION on the defendants in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, California

addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on April , 1985, at Los Angeles, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA
Signature

Case No. 529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,
vs.
KIDDER, PEABODY & CO., ET AL.,
Defendants.

REPLY BY DEFENDANTS TO OBJECTION (BY PLAINTIFF) TO DEFENDANTS' REQUEST FOR STATEMENT OF DECISION

Original Filed April 23, 1985.

Defendants and petitioners Barclay Perry and James Johnston hereby make their Reply to the Objection to Defendants' Request for Statement of Decision, dated April 18, 1985 and submitted by plaintiff Kenneth Morgan Thomas.

1. The Request for Statement of Decision [C.C.P. § 1291] filed by defendants and petitioners was timely in that the Request was "made within 10 days after the Court announce(d) a tentative decision" by its Minute Order dated April 10, 1985. As stated in open court at the conclusion of the hearing on April 5, and as is expressly set forth in the Minute Order of April 10, 1985, the matter was "taken under submission" by the Court for determination and decision. The tentative ruling published in advance of the hearing on April 5 was not the same as the tentative decision ultimately adopted by the Court on April 10. Furthermore, since the tentative ruling was *not* adopted by the Court at the April 5 hearing, it did not announce its tentative decision on that day or prior to April 10 when it issued the Minute Order. Regarding the

exception that plaintiff takes to paragraph (y) of the Request for Statement of Decision, he is expressly authorized by C.C.P. § 632 to "make proposals as to the content of the Statement of Decision". Such authorization, however, does not extend to his modifying or limiting the nature or scope of the Request submitted by defendants and petitioners and they stand on paragraph (y) of their Request.

2. The standing of defendants and petitioners Barclay Perry and James Johnston is addressed in section 4, at page 13, line 10 *et seq.* of their Memorandum of Points and Authorities filed February 22, 1985. Simply stated, their entitlement to arbitration under the Agreement was established by the Court of Appeal in *Berman v. Dean Witter & Co., Inc.*, 44 Cal.App.3d 999, at 1004, 119 Cal.Rptr. 130 (1975).

3. C.C.P. § 1291 expressly provides that:

> "A statement of decision *shall* be made by the court, if requested pursuant to Section 632, whenever an order or judgment, except a special order after final judgment, is made that is appealable under this title."
>
> [Emphasis added].

The appealability of the Order is expressly set forth in C.C.P. § 1294, which provides, in relevant part, that:

> "An aggrieved party may appeal from: "(a) An order dismissing or denying a petition to compel arbitration . . ."

Nothing in C.C.P. § 1291, as amended in 1983, limits it to a trial of a question of fact by the court, as contended by plaintiff. Furthermore, the incorporation of C.C.P. § 632 into C.C.P. § 1291 is limited solely to making the request

pursuant to the provisions of C.C.P. § 632. Defendants and petitioners have done so.

4. The perception of the plaintiff as to the sufficiency of the Minute Order is irrelevant to the C.C.P. § 1291 statutory right of defendants and petitioners to request a Statement of Decision. However, it should be noted that plaintiff acknowledges the language of the Minute Order which clearly was not set forth in the tentative ruling on April 5, 1985. (see paragraph 1 above).

For the foregoing reasons, defendants and petitioners urge that their Request for Statement of Decision be granted.

Dated: April 23, 1985

Respectfully submitted,

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By PETER BROWN DOLAN
Attorneys for Defendants
Kidder, Peabody & Co.
Incorporated,
Barclay Perry
and James Johnston

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On Apr. 23, 1985, I serve the foregoing document described as REPLY BY DEFENDANTS TO OBJECTION (BY PLAINTIFF) TO DEFENDANTS' REQUEST FOR STATEMENT OF DECISION on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JULIAN B. FENSTEN, A Professional
Corporation
BRUCE GELBER, ESQ.
700 South Flower Street
Los Angeles, California 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on April 23, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , , 19 , at , California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL — Type or Print Name

/s/ — Signature

Case No. C 529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,

vs.

KIDDER PEABODY & CO.,
BARCLAY PERRY, JAMES JOHNSTON,
Defendants.

PROPOSED STATEMENT OF DECISION
(CRC 232, CCP 632, 1291)

Original Filed: April 23, 1985
County Clerk

The specified issues listed in the defendants' April 16, 1985, request for Statement of Decision[1] are not "principal controverted issues." The following Proposed Statement of Decision sets forth the factual and legal bases for the court's ruling denying the petition and motion.

The within action is fundamentally an action to recover commissions allegedly earned as an employee of defendant. Counsel stipulated, and this Court so finds, that "commissions" as used in this case are "wages" as used in Labor Code Section 229. The ancillary causes of action for conversion, civil conspiracy and breach of fiduciary duty do not change this action into something other than one by an employee seeking different remedies for alleged

[1]Defendants requested Statement of Decision along with proposals as to the content of said Statement on April 16, 1985. There have been no further proposals for content of the Statement of Decision. CRC 232(b). Plaintiff objected to the request for Statement of Decision on the grounds none was required.

wrongful withholding of commissions. The alleged claims over and above the commissions sought arise, if at all, from defendants' actions in withholding the commissions and thus may properly be asserted along with the basic action for commissions.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware, 414 U.S. 117, controlling authority here, holds that in accordance with California Labor Code Section 229, actions to collect wages may be pursued without regard to private arbitration agreements. Accordingly, the within petition to compel arbitration and companion motion to stay proceedings in accordance with the private arbitration agreement between plaintiff and defendant are denied.

DATED: April 23, 1985.

ROBERT H. O'BRIEN
Judge of the Superior Court

C 529105

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
DEPT. 81

KENNETH MORGAN THOMAS

vs

KIDDER PEABODY & Co., et al.

April 23, 1985

Honorable Robert H. O'Brien, Judge

ORDER

NATURE OF PROCEEDINGS.

REQUEST OF DEFENDANTS FOR STATEMENT OF DECISION

Proposed Statement of Decision is signed and filed this date.

Counsel sent a copy of this order and the Proposed Statement of Decision this date by U. S. mail.

Case No. C 529105

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,
Plaintiff,
vs.
KIDDER, PEABODY & Co.,
BARCLAY PERRY, and
JAMES JOHNSTON,
Defendants.

RESPONSE TO DEFENDANTS' REPLY TO OBJECTION (BY PLAINTIFF) TO REQUEST FOR STATEMENT OF DECISION

Date Matter Heard: April 5, 1985
Time: 9:00 a.m.
Place: Department 81

Plaintiff KENNETH MORGAN THOMAS hereby responds to the Reply Brief filed by Defendants to the Objection to their Request for Statement of Decision, as follows:

1. Defendants' brief has transformed the plain meaning of the words "tentative decision" into something amorphous and unintelligible. Akin to the language of goobledegook, Defendants argue that a "tentative ruling" in not a "tentative ruling": instead, Defendants argue that the "tentative ruling" is the "Minute Order". However, the Minute Order was the *actual* ruling, while the Tentative Ruling was available on April 4, 1985, and fully known to Defendants' counsel at the hearing on April 5, 1985. Defendants' Request for Statement of Decision was not filed until April 16, 1985, and, therefore, is fatally

defective as *untimely. See University of San Francisco Faculty Association v. University of San Francisco,* 142 Cal.App.3d 942, 191 Cal.Rptr. 346 (1983).

2. With regard to the lack of standing of the individual-defendants Barclay Perry and James Johnston, Defendants' reliance on the case of *Berman v. Dean Witter and Co., Inc.,* 44 Cal.App.3d 999, 119 Cal.Rptr. 130 (1975), is misplaced. In *Berman,* persons who were not signatories to the written arbitration agreement were nevertheless bound thereby because each had acted as an agent of a signatory. In the case at bar, Defendants submitted no evidence — neither affidavits nor declarations — to show that the individual-defendants (Perry and Johnston) were acting as agents for the corporate-defendant (Kidder, Peabody) in carrying out the wrongful conduct — and for this apparent reason: the corporate-defendant is not willing to accept responsibility for the tortious acts of Defendant Perry and Defendant Johnston. In the absence of any evidence whatsoever of agency between the Defendants, these non-contracting defendants (Perry and Johnston) have no standing to seek an order to compel arbitration, nor to appeal the court's ruling, nor to request the Statement of Decision.

DATED: April 26, 1985

Respectfully submitted,

JULIAN B. FENSTEN
A Professional Corporation

By BRUCE GELBER
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower St., Los Angeles, CA 90017.

On April 26, 1985, I served the foregoing document described as RESPONSE TO DEFENDANTS' REPLY TO OBJECTION (BY PLAINTIFF) TO REQUEST FOR STATEMENT OF DECISION on Interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, California addressed as follows:

OVERTON, LYMAN & PRINCE
Attorneys at Law
550 South Flower Street, Sixth Floor
Los Angeles, California, 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail.

Executed on April 26, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at , California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA

Signature

Case No. C 529105

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
DEPT. 81

KENNETH MORGAN THOMAS

vs

KIDDER PEABODY & Co., etc., et al.

May 14, 1985

Honorable Robert H. O'Brien, Judge

ORDER

The Court having issued its proposed statement of decision on 4/23/85, now adopts said proposed statement as its Statement of Decision pursuant to CCP Sects. 232, 1291 and CRC 232.

Counsel notified by U.S. mail.

Case No. C 529105

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS,

Plaintiff,

vs.

KIDDER, PEABODY & CO., BARCLAY PERRY, AND JAMES JOHNSTON,

Defendant

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendants and petitioners Barclay Perry and James Johnston appeal from the Order of the Los Angeles County Superior Court, dated and entered April 10, 1985, denying said defendants' Motion for Order Staying Proceedings and Petition for Order Compelling Arbitration.

Dated: May 30, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON
STEPHEN E. TRAVERSE

BY PETER BROWN DOLAN
Attorneys for Defendants and Petitioners,
Kidder, Peabody &
Co. Incorporated,
Barclay Perry
and James Johnston

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On May 30, 1985, I served the foregoing document described as NOTICE OF APPEAL on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JULIAN B. FENSTEN, A Professional
Corporation
BRUCE GELBER
700 South Flower Street, 22nd Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on May 30, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at
, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL
Type or Print Name

/s/
Signature

2d Civil No. B014485
(Super. Ct. No. C529105)

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

KENNETH MORGAN THOMAS,
Plaintiff and Respondent,

v.

BARCLAY PERRY ET AL.,
Defendants and Appellants.

Filed: April 10, 1986
Clay Robbins, Jr. Clerk

OPINION

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

Overton, Lyman & Prince, Peter Brown Dolan and Maren E. Nelson for Defendants and Appellants.

Julian B. Fensten and Bruce Gelber for Plaintiff and Respondent.

Respondent Kenneth Morgan Thomas sued his former employer, Kidder, Peabody & Company, Inc., and two of its employees, appellants Barclay Perry and James Johnston. Thomas sought to recover a $40,000 commission he alleged is due to him by virtue of an oral contract with Kidder, Peabody and appellants. He sued for breach of contract, seeking damages of $40,000; and for conversion, conspiracy and breach of fiduciary duty, seeking damages of $150,000 for each cause of action. Thomas also sought punitive damages of $1½ million.

Appellants filed a motion to compel arbitration pursuant to an agreement Thomas signed at the time he was

hired by Kidder, Peabody.[1] It is undisputed that Kidder, Peabody brought a similar motion in federal court and is not a party to this appeal.

The trial court denied appellants' motion to compel, following *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware* (1973) 414 U.S. 117. The trial court found Thomas's suit to be "fundamentally an action to recover commissions." Under *Ware,* an action to collect wages may be pursued despite a private arbitration agreement, in accordance with California Labor Code section 229.[2]

Appellants contend first that Thomas's suit against them is not one for wages. They do not dispute that a commission is included in the statutory definition of wages found in Labor Code section 200. They argue that Thomas was not their employee and therefore could not have a wage claim against them. We agree with the trial court, however. Appellant Perry appears to have been Thomas's superior at Kidder, Peabody; Perry hired Thomas. Thus he may have been in a position to interfere with Thomas's receipt of his commission. Furthermore, Thomas alleged that appellants wrongfully received his commission. He seeks to recover it under a variety of theories. His action against appellants *is* an action for wages.

Appellants contend that Labor Code section 229 is preempted by the Arbitration Act, 9 United States Code

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[1]Thomas raises for the first time on appeal the issue of whether appellants have standing to enforce the arbitration agreement. Because the issue was not raised at the trial court we will not consider it here. (*Apra* v. *Aureguy* (1961) 55 Cal.2d 827, 831.)

[2]Labor Code section 229 states in pertinent part: "Actions . . . for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."

sections 1 through 14. They argue that *Ware* resolved the narrow issue of whether section 229 was preempted by the Securities and Exchange Act of 1934, 15 United States Code sections 78a through 78ll, leaving open the question of preemption by the Arbitration Act. In fact, *Ware* does mention the Arbitration Act in footnote 15 at page 135. The footnote implies that the interpretation of the Securities and Exchange Act and the arbitration clauses found in stock exchange contracts are unaffected by the Arbitration Act. Moreover, the footnote indicates that the court had the Arbitration Act before it. If section 229 were preempted by the Arbitration Act, the court could have and presumably would have said so in *Ware.*

Appellants ask this court to find *Ware* superseded by subsequent changes in the Securities and Exchange Act, relying on *Drayer* v. *Krasner* (2d Cir. 1978) 572 F.2d 348, 357-358, cert. den. 436 U.S. 948.) We decline to so hold. *Drayer* discussed the amendment to the Securities Exchange Act and the *Ware* opinion in deciding whether the New York Stock Exchange requirement that all disputes between member firms and brokers be arbitrated violated federal antitrust statutes. *Drayer* was not a preemption case. Furthermore, the court in *Drayer* was speculating with respect to whether *Ware* would have had a different result had Congress amended the Securities and Exchange Act before *Ware* was decided. Finally, the Supreme Court itself cited *Ware* as recently as 1983 on the issue not before the court in *Drayer*, i.e., state preemption. (See *Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n* (1983) 461 U.S. 375, 389.) We take this action by the Supreme Court to mean that *Ware* is still a vital case, and still binding on us.[3] (*Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209, 221).

---

[3]Because we base our decision squarely on *Ware* we do not reach Thomas's alternative ground supporting the trial court's decision.

We agree with the trial court's conclusion that Thomas has brought a suit for the recovery of wages under several theories. The contract cause of action arises out of the oral agreement giving Thomas a right to commissions on certain stock sales. The law imposes obligations apart from agreements between parties to a contract. If, as is alleged, appellants interfered with Thomas's receipt of a commission, if they wrongfully deprived him of wages by their tortious conduct, they will be liable for the damages that flow therefrom. We do not agree with appellants' suggestion that Thomas's wage claim is severable from his tort claims, and that the later are arbitrable under *Dean Witter Reynolds, Inc. v. Byrd* (1985) ____ U.S.____, 105 S.Ct. 1238.

The judgment is affirmed.

NOT TO BE PUBLISHED.

ASHBY, Acting P.J.

We concur:

HASTINGS, J.

EAGLESON, J.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION: 5
CLAY ROBBINS, JR., CLERK

Overton, Lyman & Prince,
Stephen E. Traverse
550 So. Flower St.
6th Floor
Los Angeles, CA 90071

Re: THOMAS, KENNETH MORGAN
vs.
KIDDER, PEABODY & CO, ET AL
2 Civil B014485
Los Angeles, No. C529105

The Court:

Petition for Rehearing Denied. May 6, 1986

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No. B014485

IN BANK

THOMAS,
Respondent,
v.
PERRY ET AL.,
Appellants.

Appellants' petition for review DENIED.

Filed: July 10, 1986

Laurence P. Gill, Clerk
Deputy

BIRD
Chief Justice

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 5

Overton, Lyman & Prince
Stephen E. Traverse
550 So. Flower St.
6th Floor
Los Angeles, CA 90071

RE: Thomas, Kenneth Morgan
vs.
Kidder, Peabody & Co, Et Al
2 Civil B014485
Los Angeles NO. C529105

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 04/10/86 is now final.

* * Affirmed In Full. * *

___ Appellant __X__ Respondent to recover costs.
___ Each party to bear own costs.
___ Costs are not awarded in this proceeding.

CLAY ROBBINS, JR., Clerk

Case No. 85-1257 RJK (PX)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO.
INCORPORATED,
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

PETITION TO COMPEL ARBITRATION

Petitioner Kidder, Peabody & Co. Incorporated ("Kidder Peabody") avers as follows:

I

JURISDICTIONAL AVERMENTS

1. Kidder Peabody is, and at all relevant times was, a Delaware corporation maintaining its principal place of business in New York, New York. It is, and at all relevant times was, a licensed broker/dealer of securities. It is, and at all relevant times was, a member firm of the New York Stock Exchange, Inc. ("N.Y.S.E.")

2. Respondent Kenneth Morgan Thomas ("Thomas") is, and at all times relevant was, a citizen of the State of California, residing in Los Angeles County, California. Thomas, at all relevant times was, a registered representative of Kidder, Peabody, registered with the N.Y.S.E.

3. Jurisdiction exists by virtue of diversity of citizenship, 28 U.S.C. § 1332. The amount in controversy exceeds $10,000.00, exclusive of interest and costs. Venue is proper in this District under 28 U.S.C. § 1391.

II

FACTUAL AVERMENTS

4. On or about August 16, 1982, Thomas sought employment with Kidder, Peabody. In connection therewith, Thomas executed Form U-4, Uniform Application for Securities Industry Registration, which was filed with the N.Y.S.E. on or about September 14, 1982 a copy of which is attached hereto as Exhibit A.

5. In executing Form U-4, and seeking registration with the N.Y.S.E., Thomas agreed to arbitrate any dispute, claim or controversy that might arise between him and Kidder, Peabody that is required to be arbitrated under the rules, constitution or by-laws of the organizations with which he registered, including the N.Y.S.E.

6. Rule 347 of the N.Y.S.E. provides, in relevant part, that:

> "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed in these Rules."

7. On or about January 4, 1985, Thomas filed an action against Kidder, Peabody in the Superior Court of the State of California, for the County of Los Angeles, under Case Number C 529105, a copy of which is attached hereto as Exhibit B, by which Thomas brought certain claims against Kidder, Peabody arising out of his employment with Kidder, Peabody.

8. In accordance with Rule 347 of the Rules of the N.Y.S.E. Kidder, Peabody thereafter made demand upon Thomas for arbitration of his claims against it. Despite

said demand, Thomas has failed and refused to arbitrate said claims.

WHEREFORE, pursuant to 9 U.S.C. §§ 3 and 4, plaintiff Kidder, Peabody & Co. Incorporated prays that this Court:

(1) Declare that all controversies arising out of Thomas' employment with Kidder are subject to arbitration before the N.Y.S.E.;

(2) Compel Thomas to submit the controversies set forth in the Complaint filed in the Superior Court for the State of California to arbitration before the N.Y.S.E.;

(3) Stay any action brought by Thomas herein and enjoin Thomas from prosecuting said action; and

(4) Grant plaintiff such other and further relief as may be deemed just and proper.

Dated: February 22, 1985

Respectfully submitted

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By Maren E. Nelson

Attorneys for Plaintiff
Kidder, Peabody & Co.
Incorporated

(Exhibits Omitted)

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO., INCORPORATED
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

(1) NOTICE OF HEARING ON MOTION AND PETITION; (2) MOTION FOR ORDER COMPELLING ARBITRATION; (3) MOTION FOR ORDER STAYING PROCEEDINGS; (4) MEMORANDUM OF POINTS AND AUTHORITIES.

Date: April 8, 1985
Time: 10:00 A.M.
Ctrm: 21

TO RESPONDENT KENNETH MORGAN THOMAS AND TO HIS COUNSEL OF RECORD HEREIN JULIAN FENSTEN AND BRUCE GELBER:

PLEASE TAKE NOTICE that on Monday, April 8, 1985, at 10:00 a.m., or as soon thereafter as counsel may be heard, before the Honorable Robert J. Kelleher, in Courtroom 21 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California, petitioner Kidder Peabody & Co., Incorporated ("Kidder Peabody") will, pursuant to the Petition to Compel Arbitration filed herein, move the Court for (1) an Order compelling arbitration of the claims asserted in respondent Kenneth Morgan Thomas' ("respondent's") Complaint filed in the Superior Court for the State of California, County of Los Angeles, under Case No. C 529105 ("Complaint") and (2) an Order staying respondent's prosecution of said Complaint pending arbitration.

Said Motion and Petition will be based on the grounds that respondent entered into a written agreement to arbitrate any controversy arising out of his employment with Kidder Peabody, or the termination thereof, pursuant to the Rules of the Board of Governors of the New York Stock Exchange, Inc., and that the matters complained of in the Complaint constitute controversies subject to arbitration under said agreement and under the laws of the United States.

Said motions will be based upon the provisions of 9 U.S.C. §§ 2, 3 and 4; this Notice; the Memorandum of Points and Authorities annexed hereto; all the pleadings, records and papers on file in the above-entitled action; and such oral and documentary evidence as may be presented at the hearing.

DATED: March 14, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By MAREN E. NELSON
Attorneys for Petitioner
Kidder, Peabody & Co.,
Incorporated

MOTION FOR ORDER COMPELLING ARBITRATION

Further to the Petition filed herein February 22, 1985, Kidder, Peabody hereby moves this Court for an Order Compelling Arbitration of the claims which are asserted in, and which are the subject of, respondent's Complaint, in accordance with the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc., pursuant to 9 U.S.C. § 4.

This Motion is based on the grounds that a written agreement, attached to the Petition as Exhibit A, to arbitrate controversies that arise out of respondent's employment with Kidder, Peabody or the termination thereof, exists between the parties, the matters set forth in the Complaint constitute such a controversy, and respondent has failed and refused to arbitrate said controversy.

Dated: March 14, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By MAREN E. NELSON
Attorneys for Petitioner
Kidder, Peabody & Co.,
Incorporated

MOTION FOR ORDER STAYING PROCEEDINGS

Pursuant to the provisions of 9 U.S.C. §§ 2 and 3 petitioner Kidder, Peabody & Co., Incorporated hereby moves this Court for an Order Staying Proceedings with respect to the Complaint filed by respondent until arbitration is had of the claims which are the subject of the Complaint and an award is made by the arbitrators.

This Motion is additionally based on the Petition for Order Compelling Arbitration filed herein on February 22, 1985.

Dated: March 14, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By MAREN E. NELSON
Attorneys for Petitioner
Kidder, Peabody & Co.,
Incorporated

MEMORANDUM OF POINTS AND AUTHORITIES

1. PROCEDURAL STATUS OF THIS CASE

The Complaint herein was filed in the state court on January 4, 1985. Although service of process was defective, defendants filed their Answer on February 13, 1985. Defendants thereafter made demand upon respondent for arbitration of the claims set forth in the Complaint, which demand was not acceded to. (A copy of the demand letter is attached hereto as Exhibit C.) Accordingly, Kidder, Peabody filed its Petition to Compel Arbitration on February 22, 1985 with this Court, seeking an Order, pursuant to 9 U.S.C. §§ 2, 3 and 4 that the arbitration agreement between the parties be given effect and the proceedings before the state court be stayed.

2. RESPONDENT HAS ENTERED INTO A WRITTEN AGREEMENT TO ARBITRATE THE CLAIMS ASSERTED IN THE COMPLAINT.

On or about August 16, 1982, respondent sought employment with Kidder, Peabody, a registered broker/dealer of securities and a member firm of the New York Stock Exchange, Inc. ("N.Y.S.E."), as a registered representative and officer of the firm. In connection with his employment Thomas completed and executed a Uniform Application for Securities Industry Registration (Form U-4), a copy of which is attached to the Petition herein as Exhibit A.

> Form U-4 provides, at paragraph 5 thereof, that: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register. . ."

Among the organizations with which respondent registered was the N.Y.S.E. Rule 347 of the N.Y.S.E., attached hereto as Exhibit A, provides that:

> "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization *shall be settled by arbitration, at the instance of any party, in accordance with the arbitration procedure prescribed in these Rules.*" [Emphasis supplied].

The Rules of the N.Y.S.E. pertaining to arbitration are attached hereto as Exhibit B.

As appears more fully in the Complaint (attached to the Petition as Exhibit B), respondent's claims deal with controversies arising out of his employment at Kidder, Peabody and his compensation therefor. They are thus subject to arbitration pursuant to Rule 347 of the N.Y.S.E. and Form U-4.

3. THE COURT MUST ORDER ARBITRATION IN ACCORDANCE WITH THE WRITTEN AGREEMENTS AND MUST STAY THESE PROCEEDINGS PENDING ARBITRATION.

The United States Arbitration Act ("Act"), 9 U.S.C. §§ 1-14, provides that the agreement between respondent and Kidder Peabody herein must be given effect and requires that the state court's proceeding be stayed pending arbitration of respondent's claims.

Section 2 of the Act, 9 U.S.C. § 2, provides that:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be *valid, irrevocable,* and *enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract." [Emphasis added.]

The United States Supreme Court has recently recognized that:

> "Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

Moses H. Cone Hospital v. Mercury Construction Corporation, 460 U.S. 1, 74 L.Ed.2d 765, 785, 103 S.Ct. 927 (1983) [Emphasis added].

Here, the arbitration clause in question is written and appears in a contract evidencing transactions involving interstate commerce, *i.e.*, securities transactions. Thus, the agreements to arbitrate are, pursuant to 9 U.S.C. § 2, valid, irrevocable, and enforceable.

Numerous federal courts have carefully considered the applicability and enforceability of N.Y.S.E. Rule 347, and they have uniformly concluded that the N.Y.S.E. Constitution and Rules constitute binding agreements between member firms and their registered representatives creating a legal obligation on the part of both parties to arbitrate. *See, Drayer v. Krasner*, 572 F.2d 348 (*2nd* Cir. 1978), *cert. denied* 436 U.S. 948 (1978); *Muh v. Newberger*

Loeb & Co., 540 F.2d 970, 973 (9th Cir. 1976); *Coenen v. W.R. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Downing v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 725 F.2d 192 (2d Cir. 1984).

Since the agreements are valid, this Court is *required, as a matter of substantive federal law,* to compel arbitration of plaintiff's claims and stay the proceedings herein pursuant to 9 U.S.C. §§ 3 and 4. Section 4 provides that upon receiving a petition to compel arbitration:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the Court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

9 U.S.C. § 4 [Emphasis added.] *See also, Southland Corporation v. Keating,* ___ U.S. ___, 104 S. Ct. 852, 79 L. Ed. 2d 1, 12-13 (1984); *Dean Witter Reynolds, Inc. v. Byrd,* ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 45 C.C.H. S. Ct. Bull. P., B 1431, 1437 (3/4/85). ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* [Emphasis in Original.]

Further, 9 U.S.C. § 3 provides that:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under the agreement, *shall,* on application of one of the parties, *stay the trial* of the action until such arbitration has been had in accordance with the terms and agreement . . . "

9 U.S.C. § 3 [Emphasis added.]

Here, the arbitration agreements are broadly worded to require arbitration of *any* controversy between a registered representative such as respondent and Kidder Peabody arising out of respondent's employment, or the termination thereof, by Kidder Peabody. Accordingly, the claims are referable to arbitration, and, pursuant to 9 U.S.C. § 3, this Court *must* stay the proceedings before the state court.

5. CONCLUSION.

Respondent executed a written agreement in which he expressly and unequivocally agreed to arbitrate. The Complaint filed in the state court alleges claims which fall within the class of controversies covered by said agreement. It is therefore respectfully urged that respondent be ordered to submit his claims to arbitration pursuant to the rules of the N.Y.S.E., and that, pending the completion of said arbitration, proceedings in the state court be stayed.

DATED: March 14, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By MAREN E. NELSON
Attorneys for Petitioner
Kidder Peabody & Co.,
Incorporated

(EXHIBITS OMITTED)

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On March 15, 1985, I served the foregoing document described as (1) Notice of Hearing on Motion and Petition; (2) Motion for Order Compelling Arbitration; (3) Motion for Order Staying Proceedings; (4) Memorandum of Points and Authorities on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JULIAN B. FENSTEN, ESQ.
A Professional Corporation
700 South Flower Street
22nd Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on March 15, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL — Type or Print Name

/s/ — Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY, INCORPORATED,

Petitioner,

vs.

KENNETH MORGAN THOMAS,

Respondent.

ANSWER TO PETITION TO COMPEL ARBITRATION

Respondent KENNETH MORGAN THOMAS, answering the Petition herein, alleges:

1. On or about January 4, 1985, Respondent filed the underlying civil action in the Superior Court of the State of California, County of Los Angeles, against corporate-defendant KIDDER, PEABODY & COMPANY (Petitioner herein), and against individual defendants BARCLAY PERRY and JAMES JOHNSTON, and against DOES 1 to 20, and against defendant MARTIN McBROOM who was sued and served thereafter as DOE 1.

2. Said action filed in State Court arises from the wrongful denial of wages (earned commissions) which were owing to Respondent for work he had performed as an employee for Petitioner, KIDDER, PEABODY & COMPANY, the corporate-defendant in the State Court action.

3. The conduct of defendants in this action, including Petitioner herein, was outrageous in view of the special trust and confidence inherent in the relationship between the parties, and Respondent seeks compensatory and punitive damages arising from defendants' conduct.

4. On or about February 13, 1985, the law firm of Overton, Lyman and Prince filed an Answer in the State Court action on behalf of the following defendants: (1) the corporate-defendant KIDDER, PEABODY & COMPANY, (2) individual defendant BARCLAY PERRY, and (3) individual defendant JAMES JOHNSTON. Therein, said corporate and individual defendants alleged that the matter was subject to a binding agreement to arbitrate controversies.

5. On or about February 22, 1985, all three said defendants filed a motion in the State Court proceeding for an order staying the proceedings in the State Court action pending arbitration of the claims therein. Said motion was brought pursuant to the provisions of 9 U.S.C. §§ 2 and 3 and California *Code of Civil Procedure* § 1281.4. Defendants BARCLAY PERRY and JAMES JOHNSTON further brought a petition in the State Court for an order compelling arbitration of the underlying action. Said motion for an order staying proceedings and for an order compelling arbitration is set for hearing in Department 81 of the Superior Court for the County of Los Angeles on April 5, 1985.

6. On or about February 22, 1985, the corporate defendant KIDDER, PEABODY (Petitioner herein) filed in this United States District Court a Petition to Compel Arbitration, raising therein the identical issues which were brought before the State Court in the Answer filed by the three said defendants (including this corporate defendant, KIDDER, PEABODY) and in the Motion filed in State Court for an order staying proceeding and for an order compelling arbitration which was filed in the State Court on or about February 22, 1985.

7. Contrary to Petitioner's allegation as to the basis for federal jurisdiction, diversity of citizenship does not exist since the plaintiff in the State Court action and the

KIDDER, PEABODY co-defendants BARCLAY PERRY and JAMES JOHNSTON are all residents of the State of California.

8. There is presently pending in the State Court parallel litigation involving the identical issues and parties.

9. Under § 229 of the California *Labor Code,* a civil action for the collection of due and unpaid wages is not subject to compulsory arbitration. Under § 200 of the California *Labor Code,* the term "wages" includes earnings on a commission basis. The United States Supreme Court has ruled unanimously that an account executives' action for unpaid wages is not subject to compulsory arbitration in accordance with California *Labor Code*, § 229, notwithstanding any agreement to arbitrate.

WHEREFORE, Respondent moves that an order be entered herein denying the Petition of KIDDER, PEABODY AND COMPANY for an Order Compelling Arbitration of this matter and awarding Respondent his costs and disbursements and for such other relief as may be proper.

DATED: March 25, 1985

Respectfully submitted,

JULIAN B. FENSTEN
A Professional Corporation

By: BRUCE GELBER
Attorneys for Respondent
Kenneth Morgan Thomas

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower Street, 22nd Floor, Los Angeles, CA 90017.

On March 25, 1985, I served the foregoing document described as ANSWER TO PETITION TO COMPEL ARBITRATION on Interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA

addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail. Executed on March 25, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA

Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY, INCORPORATED,
Petitioner,
vs.
KENNETH MORGAN THOMAS,
Respondent.

(1) OPPOSITION OF RESPONDENT KENNETH MORGAN THOMAS TO MOTION FOR ORDER COMPELLING ARBITRATION AND FOR ORDER STAYING PROCEEDINGS; (2) CROSS-MOTION OF RESPONDENT KENNETH MORGAN THOMAS TO DISMISS PETITION TO COMPEL ARBITRATION WHICH WAS BROUGHT IN FEDERAL COURT; (3) DECLARATION OF KENNETH MORGAN THOMAS; and (4) DECLARATION OF BRUCE GELBER

Date: April 8, 1985
Time: 9:00 a.m.
Ctrm: 21

COMES NOW, Respondent KENNETH MORGAN THOMAS in opposition to the Motion of Petitioner KIDDER, PEABODY & COMPANY, INC., for an order compelling arbitration and for an order staying the proceedings in the State Court, and in support of Respondent KENNETH MORGAN THOMAS' Cross-Motion to Dismiss the Petition to Compel the Arbitration filed in this Court, hereby submits the following Memorandum of Points and Authorities, Declarations in support thereof, and Cross-Motion to dismiss the federal action.

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CROSS-MOTION FOR DISMISSAL OF THE FEDERAL ACTION

Respondent KENNETH MORGAN THOMAS moves this Court for an Order dismissing the Petition to Compel Arbitration filed by KIDDER, PEABODY & COMPANY, INC., the corporate-defendant in the State Court action.

This Motion is based on the following grounds:

1. This Court is without jurisdiction since Title 9, Section 4 of the *United States Code* requires that there be an independent basis for federal jurisdiction; and although Petitioner alleges that there is a diversity of citizenship between the parties, the same is defeated by virtue of the fact that the individual defendants (BARCLAY PERRY and JAMES JOHNSTON), with whom Petitioner jointly-filed an Answer in the State Court proceedings, are residents of the same state (California) as the plaintiff in that action (Respondent herein), thereby defeating diversity jurisdiction. Said Answer filed in the State Court is attached as Exhibit "A" to the Declaration of Bruce Gelber, filed herewith.

2. The identical issues regarding arbitration of this matter have already been raised in the State Court proceedings; said motion was filed in the State Court before it was filed in this United States District Court; and the motion is set for hearing in the State Court on April 5, 1985, which is prior to the date set for hearing of this matter in the United States District Court.

3. This matter is not appropriate for arbitration under the ruling of the United States Supreme Court in *Merrill Lynch, Pierce Fenner & Smith, Inc., vs. Ware*, 414 U.S. 117 (1973), wherein the high Court unanimously ruled that an account executives' civil action for unpaid wages (including earned commissions) cannot be subject to compulsory arbitration in accordance with the statutory proscription

against such forced arbitration as declared in California *Labor Code* § 229.

This Motion is further based on the Memorandum and Declarations filed herewith.

DATED: March 25, 1985

JULIAN B. FENSTEN
A Professional Corporation

By: BRUCE GELBER
Attorneys for Respondent
Kenneth Morgan Thomas

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF MATERIAL FACTS

On January 4, 1985, plaintiff filed the underlying civil action in the Superior Court of the State of California for the County of Los Angeles, bearing Case No. C 529105. Therein, plaintiff brought claims against the corporate-defendant KIDDER, PEABODY & COMPANY (Petitioner herein), and individual defendants BARCLAY PERRY and JAMES JOHNSTON, for tortious conduct by said defendants resulting in the wrongful denial of wages (earned commissions) which were owed to plaintiff for the work he had performed as an employee for KIDDER, PEABODY & COMPANY. Plaintiff filed causes of action for Conversion, Conspiracy to Commit Conversion, Breach of Fiduciary Duty, and Breach of Contract. Plaintiff further claimed that the actions of defendants constituted outrageous conduct in view of the special trust and confidence inherent in the relationship between the parties, and plaintiff sought compensatory and punitive damages as the result of defendants' conduct.

On or about February 13, 1985, the law firm of Overton, Lyman, and Prince filed a joint-Answer on behalf of the following named-defendants in the State Court action:

(1) Corporate-defendant KIDDER, PEABODY & COMPANY,

(2) Individual-defendant BARCLAY PERRY, and

(3) Individual-defendant JAMES JOHNSTON.

In their joint-Answer in the State Court action, defendants claimed that the Complaint filed in the State Court was subject to compulsory arbitration.

On or about February 22, 1985, the corporate-defendant (KIDDER, PEABODY) and the individual-defend-

ants (BARCLAY PERRY and JAMES JOHNSTON) filed a Motion in the State Court for an order staying proceedings pending arbitration; and, further, at the same said time, a Petition for Order Compelling Arbitration was filed in the State Court. However, the Petition to Compel Arbitration was brought only in the names of the individual defendants, BARCLAY PERRY and JAMES JOHNSTON.

On or about February 22, 1985, defendant KIDDER, PEABODY filed a separate Petition to Compel Arbitration in this United States District Court. Therein, Petitioner KIDDER, PEABODY averred that jurisdiction exists in this Federal Court by virtue of diversity of citizenship (28 U.S.C. § 1332), even though (a) Petitioner had already filed an Answer in the State Court and (b) the identical issues had been raised by way of motions filed in the State Court, i.e., motions to compel arbitration and to stay proceedings pending such arbitration. In filing their Petition in this Court, Petitioner did not disclose that it had already an Answer in the State Court proceeding jointly with two individual defendants (PERRY and JOHNSTON); nor did Petitioner disclose that said individual defendants (PERRY and JOHNSTON) were California residents. By virtue of the fact that plaintiff and the individual defendants (PERRY and JOHNSTON) were all California residents, there is *no diversity* of citizenship and, thus, no basis for Federal Court jurisdiction under 28 U.S.C. § 1332.

On or about March 15, 1985, Petitioner KIDDER, PEABODY, filed the pending motion in this Federal Court for an order compelling arbitration and for an order staying the State Court proceedings. Said motions filed in this Court are identical to the motions filed in State Court on or about February 22, 1985, and the State Court motions are presently set for hearing in Depart-

ment 81 of the Superior Court of the County of Los Angeles on April 8, 1985.

In his Complaint, plaintiff seeks relief for the unlawful denial of wages (earned commissions), and plaintiff further seeks compensatory and punitive damages because the conduct of defendants was outrageous and oppressive. Under § 229 of *California Labor Code,* a civil action to recover unpaid wages (including commissions) "*may be maintained without regard to the existence of any private agreement to arbitrate.*" Under § 200 of the *California Labor Code,* the term "wages" includes earned commissions. In 1973, the United States Supreme Court ruled unanimously that a civil action brought in California by an account executive for unpaid wages cannot be subject to compulsory arbitration under *California Labor Code* § 229, notwithstanding the existence of any private agreement to arbitrate. Said ruling *(Merrill Lynch, Pierce, Fenner and Smith, Inc. vs. Ware,* 414 U.S. 117, 94 S. Ct. 383 (1973)), and statute (*California Labor Code* § 229) are controlling herein.

It is further of note that the pending Motions brought by Petitioner KIDDER, PEABODY do not satisfy even the most rudimentary demands of Local Rules 7.5.1, 7.5.2, and 7.5.3. Said Rules require that the Motion be supported by affidavits or declarations containing the evidentiary matters supporting the Motions. The only support for Petitioner's position is the gratuitous statements of its counsel regarding the purported "agreement" to arbitrate controversies.

I

THE PENDING MOTION OF KIDDER, PEABODY AND COMPANY SHOULD BE DISMISSED FOR LACK OF FEDERAL JURISDICTION.

Petitioner has brought the pending Motion to Compel Arbitration under the provision of Title 9, § 4 of the *United States Code* (the Federal Arbitration Act). Under 9 U.S.C. § 4, it is expressly required that petitions to compel arbitration under the said Arbitration Act allege an *independent ground* of federal jurisdiction. *Commercial Metals Company vs. Balfour Guthrie & Company, Ltd.*, 577 F.2d 264, 268 (5th Cir. 1978). The Arbitration Act itself (9 U.S.C. § 2) is not federal law which furnishes such independent basis of jurisdiction. *Commercial Metals Co.*, 577 F.2d at 268-69. The court in *Commercial Metals* noted that a long line of other courts had considered the matter and had required an independent basis for federal jurisdiction for petitions filed under 9 U.S.C. § 4. *See also, Robert Lawrence Company vs. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir. 1959), *Amalgamated Association, etc., vs. Southern Bus Line,* 189 F.2d 219 (5th Cir. 1951).

In the matter pending before this Court, Petitioner KIDDER, PEABODY alleges that federal jurisdiction exists by virtue of diversity of citizenship, citing 28 U.S.C. § 1332.

It has been a time-honored principle dating back to *Strawbridge vs. Curtiss,* 3 Cranch (U.S.) 267, 2 L.Ed. 435 (1806), that federal jurisdiction does not exist under 28 U.S.C. § 1332 in the absence of *complete diversity* of citizenship between plaintiff and all defendants. *See also, Camp vs. Cress,* 250 U.S. 308, 63 L.Ed. 997 (1919); *Trivett vs. Bank of Delaware,* 421 F.Supp. 827 (D.Del. 1976).

Petitioner PEABODY failed to disclose that its co-defendants in the State Court action (individual-defendants BARCLAY PERRY and JAMES JOHNSTON) are from the same state (California) as plaintiff in the State Court action. Therefore, there is *no diversity of citizenship* as required by 28 U.S.C. § 1332 and, thus, no independent basis for federal jurisdiction as required by 9 U.S.C. § 4. Petitioner herein was certainly aware of the fact that the individual defendants (PERRY and JOHNSTON) were party-defendants in the California Superior Court lawsuit since Petitioner *jointly-filed its Answer* with said California defendants in the State Court action. (See Answer of Defendants KIDDER, PEABODY, PERRY and JOHNSTON which is attached as Exhibit "A" to the Declaration of Bruce Gelber). The Petition and Motion to Compel Arbitration should be dismissed on this jurisdictional basis alone.

II

KIDDER, PEABODY'S PETITION TO COMPEL ARBITRATION SHOULD BE DISMISSED AS AN IMPROVIDENT TACTICAL MANEUVER WHICH MERELY DUPLICATES THE PROCEEDINGS IN STATE COURT THEREBY CREATING A MULTIPLICITY OF PROCEEDINGS AND A WASTE OF JUDICIAL RESOURCES.

The issues presented to this Court in the pending motion are identical to the issues presented to the State Court in defendants' Motion to Compel Arbitration filed on February 22, 1985, and set for hearing in April 5, 1985. (See Exhibit "B" attached to the Declaration of Bruce Gelber). This Petitioner KIDDER, PEABODY (the corporate-defendant in the State Court action) joined with its co-defendants in moving before the State Court for a stay of proceedings pending arbitration. The only difference — a tactical one, at best — is that KIDDER, PEABODY did not join its co-defendants (PERRY and

JOHNSTON) in their Motion in State Court for an Order Compelling Arbitration; instead, KIDDER, PEABODY splintered off and brought the identical motion in this United States District Court. KIDDER, PEABODY claimed that federal jurisdiction existed by virtue of diversity of citizenship. KIDDER, PEABODY did not disclose the fact that *it had already filed its Answer in the State Court action jointly with two individual defendants (PERRY and JOHNSTON) who were both California residents,* thereby defeating the basis for federal jurisdiction.

Notwithstanding the fact that there is no complete diversity of citizenship and, therefore, no basis for federal jurisdiction, KIDDER, PEABODY'S Petition to Compel Arbitration should be dismissed on a second and independent ground: in accordance with the Supreme Court's ruling in *Colorado River Water Conservation District vs. United States,* 424 U.S. 800 (1976), this Federal District Court should decline to exercise its jurisdiction, assuming it existed, because of parallel State Court litigation involving the identical circumstances and issues. *Colorado River Water Conservation District,* 424 U.S. at 818; *Moses H. Cone Memorial Hospital vs. Mercury Construction,* 460 U.S. 1, 103 S.Sct. 927 (1983). The High Court has noted that there is no hard-and-fast rule for dismissals of this type; rather, there are a number of relevant factors that must be balanced. In *Colorado River,* the Supreme Court stated that, in cases of contemporaneous exercise of concurrent jurisdiction by a State Court and a Federal Court, the circumstances which could justify the dismissal of the federal action include: (1) the assumption of jurusdiction over a *res* by the State Court; (2) the desirability of avoiding piecemeal litigation; (3) the inconvenience of a federal forum; and (4) the order in which concurrent jurisdiction was obtained by the two forums.

(424 U.S. 818-19). While factors (1) and (3) are not applicable in this matter, factors (2) and (4) weigh heavily in favor of dismissal of the federal action.

In particular, the order in which concurrent jurisdiction was obtained should be controlling in this matter. Petitioner filed its Answer in the State Court action on or about February 13, 1985, and the Motion to Compel Arbitration was filed in said State Court by Petitioner's counsel (on behalf of co-defendants PERRY and JOHNSTON) on or about February 22, 1985, with the hearing presently set for April 5, 1985. The proceedings in Federal Court, by contrast, have merely shadowed the State Court proceedings. In weighing this "priority" element in determining whether the federal action should be dismissed in favor of the concurrent State action, the Supreme Court in *Moses H. Cone Memorial Hospital,* ruled:

> "This factor, as with the other *Colorado River* factors is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priority should not be measured exclusively by which complaint was filed first, rather in terms of how much progress has been made in the two actions. *Colorado River,* illustrates this point well. There, the federal suit was actually filed first. Nevertheless, we pointed out as a factor favoring dismissal 'the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss.' "

Moses H. Cone, 460 U.S. at 21-22, 103 S.Ct. at 940, citing *Colorado River,* at 424 U.S. at 820, 96 S.Ct. at 1248. In sharp contrast with the case at bar, the Court in *Moses H. Cone,* found that dismissal was inappropriate because, "[i]n realistic terms, the federal suit was running well ahead of the state suit at the very time the District Court

decided to refuse to adjudicate the claim." 460 U.S. at 22, 103 S.Ct. at 940.

The Court in *Moses H. Cone* further noted that the "vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River* . . . ." 460 U.S. at 17, n.20, 103 S.Ct. at 938 n.20. The vexatious nature of the pending federal action is evident from the fact that there is neither rhyme nor reason for costly and wasteful duplication of proceedings since the same parties are involved in the same State Court action where a motion is now pending on the identical issues involved herein.

The decision in *Moses H. Cone,* as relied upon by Petitioner, is distinguishable for an additional reason. Therein, the Court noted that there was considerable doubt whether the State Court (North Carolina) would have properly applied the law as it related to the Federal Arbitration Act, 9 U.S.C. § 1 *et.seq.* Petitioner has submitted no evidence — let alone any affidavits or declarations — to suggest that the California State court, which will entertain the identical motion on April 5, 1985, is not fully capable and competent to apply the law. The federal action constitutes an unreasonable waste of judicial resources.

III

THE PENDING MOTION TO COMPEL ARBITRATION IS COMPLETELY DEVOID OF MERIT UNDER THE SUPREME COURT'S RULING IN MERRILL LYNCH PIERCE FENNER & SMITH, INC. VS. WARE, 414 U.S. 117, 94 S.CT. 383 (1973) AND THE PROVISION OF § 229 OF THE CALIFORNIA LABOR CODE.

The pending motion is supported neither by affidavit nor declaration, and its memorandum is based on generalities, not specifics. While the general rule is that arbitration agreements are enforceable, the purported "agreement" at issue in this matter is not valid or enforceable for a number of reasons.

First, the Supreme Court of the United States has ruled unanimously that an account executives' civil action for the wrongful denial of wages is not subject to compulsory arbitration, notwithstanding the purported "agreement" to arbitrate as indicated in Form U-4; yet, in bringing their Motion to Compel Arbitration, Petitioner is, in effect, asking this Court to overrule the decision of the Supreme Court in *Merrill Lynch Pierce Fenner & Smith, Inc. vs. Ware*, 414 U.S. 117, 94 S.Ct. 383 (1973), without bringing this controlling authority to the attention of the Court. *Ware* involves virtually the same factual setting and legal issues as arise in the pending motion: (a) both plaintiffs (Ware and Thomas) had been account executives employed in the California office of a member-corporation of the New York Stock Exchange; (b) civil actions had been filed in State Court for the wrongful denial of wages due and owing to plaintiffs; and (c) in both cases, the defendants asserted that the boiler-plate provisions in Form U-4, which plaintiffs were required to sign as a condition of employment, effectively barred their access to the civil court for relief.

In *Ware*, the Supreme Court confronted the identical issue which is now before this Court: "Whether, in the context of the present case, § 229 of the California Labor Code, which would preclude compulsory arbitration of wage disputes, is ineffective under the Supremacy Clause . . . " *Ware*, 414 U.S. at 125. § 229 of the *California Labor Code*, as discussed hereinbefore, provides that a civil action to recover due and unpaid wages *may be maintained without regard to the existence of any private agreement to arbitrate.* After weighing the competing State and Federal interests involved, the Supreme Court concluded:

> "*In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme. We find no such interference and we also find in the structure of the [Federal Arbitration] Act intent on the part of Congress that state policies in this area should operate vigorously.*"

Ware, 414 U.S. at 139-40 [emphasis added].

A second ground for discounting the merits of the pending motion is that the purported "agreement" for compulsory arbitration (form U-4) is an unenforceable contract of adhesion which has been judicially determined to be unduly oppressive, unconscionable, presumptively biased in favor of management, and fails to satisfy the minimum standards of integrity. *Ware, supra*, 414 U. S. 117 1973); *Hope vs. Superior Court of Santa Clara County*, 122 Cal.App.3d 147, 175 Cal.Rptr. 851 (1981); *Tonetti vs. Shirley and Kidder, Peabody & Company, Inc.*, ____ Cal. App.3d ____, 85 Daily Journal D.A.R. 585, filed February 19, 1985.

In ruling that the arbitration paragraph in Form U-4 constituted an unenforceable contract of adhesion, the Court in *Hope* noted that:

> . . ."[T]he structure of governance of the Exchange is such that there exist a presumptively *institutional* bias in favor of member firms and members who constitute the electoral constituency of the board. Petitioners, being outside constituency [citations] have legitimate cause to complain."

Hope, 122 Cal.App.3d 153-154 [emphasis in the original].

The ruling in *Hope* was reaffirmed in the recent decision in *Tonetti vs. Shirley and Kidder, Peabody & Company, Inc.*, ____ Cal.App.3d ____, 85 Daily Journal D.A.R. 585 (filed February 19, 1985), wherein the Court ruled:

> "Here, however, Kidder has failed to sustain its burden of showing the NYSE Constitution and Rules are fair as applied to an employment of a member firm. . . . because we cannot determine from the record before us whether an employee is protected from the presumption of institutional bias in favor of management, Kidder did not meet its burden of establishing the fairness of the arbitration procedure in the trial court. Consequently, we conclude the NYSE arbitration procedures 'failed to meet the minimal levels of integrity' required by [*Graham vs.*] *Scissors Tail,* 28 Cal.3d 807, 171 Cal.Rptr. 604 (1981)]. Thus, the presumption of institutional bias as established in *Hope* has not been rebutted, and the arbitration provisions are unconscionable and unenforceable."

(*Tonetti,* 85 Daily Journal D.A.R. at 587.)

In the case at bar, Petitioner KIDDER, PEABODY & COMPANY has made *no evidentiary showing* whatsoever.

Neither declarations nor affidavits have been filed. No evidence supports the pending motion. Under these circumstances, the Petition to Compel Arbitration should be dismissed as frivolous.

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that Petitioner's Motion to Compel Arbitration and Motion to Stay the Proceedings should be denied and that the Cross-Motion of Respondent KENNETH MORGAN THOMAS to dismiss the federal action be granted along with an award of costs and disbursements for responding to the Petition and pending Motion.

DATED: March 25, 1985

Respectfully submitted,

JULIAN B. FENSTEN
A Professional Corporation

By: BRUCE GELBER
Attorneys for Respondent
Kenneth Morgan
Thomas

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower Street, 22nd Floor, Los Angeles, California 90017.

On March 25, 1985, I served the foregoing document described as OPPOSITION OF RESPONDENT KENNETH MORGAN THOMAS TO MOTION FOR ORDER COMPELLING ARBITRATION AND FOR ORDER STAYING PROCEEDINGS; CROSS-MOTION OF RESPONDENT KENNETH MORGAN THOMAS TO DISMISS PETITION TO COMPEL ARBITRATION WHICH WAS BROUGHT IN FEDERAL COURT on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, California, 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail.

Executed on March 25, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA

Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY, INCORPORATED,
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

DECLARATION OF BRUCE GELBER IN OPPOSITION TO PETITIONER'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND IN SUPPORT OF CROSS-MOTION TO DISMISS PETITION TO COMPEL ARBITRATION

Date: April 8, 1985
Time: 10:00 a.m.
Ctrm: 21

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss

I, BRUCE GELBER, declare and state as follows:

1. I am an attorney at law, licensed to practice before the Courts of the State of California, and am admitted to practice in this District Court, and am a member of the law firm of Julian B. Fensten, A Professional Corporation, attorneys for plaintiff in the above-entitled action. I have personal knowledge of the facts as hereinafter set forth and, if called as a witness, I could and would competently testify thereto under oath.

2. I make this Declaration in opposition to the Motion by Petitioner KIDDER, PEABODY & COMPANY, INC. for an order compelling arbitration of the claims set forth

in the Complaint of Respondent KENNETH MORGAN THOMAS filed in the Superior Court for the State of California, County of Los Angeles, bearing case No. C 529105, and for an order staying prosecution of said Complaint pending arbitration. I further make this Declaration in support of Respondent's Cross-Motion to Dismiss the federal action.

3. Attached hereto as Exhibit "A" of this Declaration is the Answer filed by Petitioner KIDDER, PEABODY & COMPANY and co-defendants BARCLAY PERRY and JAMES JOHNSTON, which Answer was filed in the Superior Court for the County of Los Angeles on or about February 13, 1985. A copy of said Answer filed in the State Court was received by Respondent's counsel on February 14, 1985. Said Answer shows that petitioner consented to the jurisdiction of the State Court prior to filing the petition in Federal Court.

4. Attached hereto as Exhibit "B" are the moving papers filed by Petitioner KIDDER PEABODY, along with co-defendants PERRY and JOHNSTON, in the State Court action, wherein said defendants raised the identical issues and seeks the identical relief as is presented by the motion now pending before this Court.

Executed this 25th day of March, 1985, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

BRUCE GELBER

(Exhibits Omitted)

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower Street, 22nd Floor, Los Angeles, California 90017.

On March 25, 1985, I served the foregoing document described as DECLARATION OF BRUCE GELBER IN OPPOSITION TO PETITIONER'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND IN SUPPORT OF CROSS-MOTION TO DISMISS PETITION TO COMPEL ARBITRATION on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, California, 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at .

Executed on March 25, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA

Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY,
INCOPORATED,

vs.

KENNETH MORGAN THOMAS,
Respondent.

DECLARATION OF KENNETH MORGAN THOMAS IN OPPOSITION TO PETITIONEP'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND IN SUPPORT OF CROSS-MOTION TO DISMISS PETITION TO COMPEL ARBITRATION

DATE: April 8, 1985
Time: 10:00 a.m.
Ctrm: 21

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss

I, KENNETH MORGAN THOMAS, declare and state as follows:

1. I am Respondent in the above-entitled federal action. I am the plaintiff in the parallel litigation which had been initially filed in the Superior Court of the State of California for the County of Los Angeles, bearing case No. C 529105. I have personal knowledge of the facts stated herein and can and will testify competently thereto if called as a witness.

2. I make this Declaration in opposition to the motion by Petitioner KIDDER, PEABODY & COMPANY to compel arbitration of the matter now pending in the State Court. I further make this Declaration in support of my

Cross-Motion to Dismiss the Petition to Compel Arbitration filed by KIDDER, PEABODY.

3. The lawsuit filed in the State Court concerned wages which have accrued and are unpaid. Defendants have refused to pay these wages (my earned commissions as an account executive for KIDDER, PEABODY & COMPANY), and the manner in which they refused to pay my wages was arbitrary, oppressive, harassing and vexatious.

4. Prior to February 15, 1985, I was unaware of any such alleged agreement between KIDDER, PEABODY and myself to arbitrate under the rules of the New York Stock Exchange any dispute as to the payment of wages which are due and owing and yet unpaid. On or about said date, I was contacted by one of my attorneys, Bruce Gelber of the law offices of Julian B. Fensten, who advised me that a letter had been received from the attorneys for KIDDER, PEABODY, wherein the claim was made that I had agreed in August, 1982, to arbitrate this claim. Your Declarant had never been advised by anyone, including Petitioner KIDDER, PEABODY of the existence of any such agreement to arbitrate any claim for unpaid wages. I was never advised that, as a condition of obtaining employment with KIDDER, PEABODY I would be required in advance of any dispute to waive certain of my Constitutional rights, including my right to a trial by jury by my peers rather than by arbitrators who share a close affinity with the Petitioner, due to the fact that the selection of arbitrators is made by the Exchange, of which KIDDER, PEABODY is a member.

5. BARCLAY PERRY and JAMES JOHNSTON are co-defendants with Petitioner KIDDER, PEABODY in the State Court action. Defendant PERRY and defendant JOHNSTON are California residents and worked in the

same office for KIDDER, PEABODY in Los Angeles as your Declarant. Thus, your Declarant is a resident of the same state (California) as defendant PERRY and defendant JOHNSTON.

Executed this 25th day of March, 1985, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

KENNETH MORGAN THOMAS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower Street, 22nd Floor, Los Angeles, CA 90017.

On March 25, 1985, I served the foregoing document described as DECLARATION OF KENNETH MORGAN THOMAS IN OPPOSITION TO PETITIONER'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND IN SUPPORT OF CROSS-MOTION TO DISMISS PETITION TO COMPEL ARBITRATION on Interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, California, 90071

Attention: Maren E. Nelson

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☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA
Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO. INCORPORATED,
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

REPLY MEMORANDUM OF PETITIONER KIDDER, PEABODY & CO., INCORPORATED IN SUPPORT OF MOTION FOR ORDER COMPELLING ARBITRATION AND STAYING PROCEEDINGS

Date: April 8, 1985
Time: 10:00 a.m.
Place: Courtroom 21

Petitioner Kidder, Peabody & Co., Incorporated ("Kidder Peabody") hereby makes its Reply to the Opposition of Respondent Kenneth Morgan Thomas to Motion for Order Compelling Arbitration and for Order Staying Proceedings.

1. THIS COURT HAS JURISDICTION BY VIRTUE OF DIVERSITY OF CITIZENSHIP BETWEEN PETITIONER AND RESPONDENT

In the Jurisdictional Averments of its Petition to Compel Arbitration (paragraphs 1, 2 and 3 at pages 1 and 2), petitioner Kidder Peabody sets forth the factual basis for diversity jurisdiction. In his Answer to Petition to Compel Arbitration respondent Kenneth Morgan Thomas ("Thomas") sets forth a mixture of procedural facts and legal conclusions, but he does not deny any of the averments of Kidder Peabody in its Petition to Compel Arbitration. Accordingly, it is submitted that all jurisdictional averments are admitted and that diversity jurisdiction exists. The fact that Thomas and other defendants in the Los Angeles county Superior Court action may be citizens of the same state is irrelevant since neither of those other defendants (Barclay Perry and James Johnston) are parties to the petition in this action. Kidder Peabody has not sought to remove the Los Angeles County Superior Court action to this court and does not attempt to do so by its Petition to Compel Arbitration. The diversity of citizenship between Kidder Peabody and Thomas is uncontested and there exists an independent basis for federal jurisdiction under 28 U.S.C. § 1332.

2. THE PETITION BY KIDDER PEABODY IS NEITHER "AN IMPROVIDENT TACTICAL MANEUVER" NOR DUPLICATIVE OF THE STATE COURT PROCEEDINGS.

In his Opposition (at page 13, line 22) Thomas, in referring to the opinion of the United States Supreme Court in *Moses H. Cone Memorial Hospital vs. Mercury Construction Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 785, 103 S.Ct. 927 (1983), states that:

> "The Court noted that there was considerable doubt whether the State Court (North Carolina) would have properly applied the law as it related to the Federal Arbitration act, 9 U.S.C. § 1 *et seq.*"

Thomas goes on to state that Kidder Peabody has submitted no evidence that the Los Angeles Superior Court is not fully capable and competent to apply that law. However, Thomas (at page 17 of his Opposition) both cites and quotes from *Tonetti vs. Shirley* and Kidder Peabody & Company, Inc. For the convenience of the Court, a copy of the *Tonetti* Opinion is attached hereto as Exhibit "A" and a copy of the Order for Rehearing is attached hereto as Exhibit "B". It is submitted that the *Tonetti* Opinion

demonstrates the considerable doubt whether California courts will enforce the federal substantive law of arbitration. It is for this very reason that Kidder Peabody filed its Petition to Compel Arbitration in this Court rather than the Los Angeles County Superior Court. Kidder Peabody has no interest whatsoever in causing duplication of judicial effort or participating in parallel proceedings. However, it has a legitimate and well founded concern with the question of enforcement of its arbitration rights in the state courts of California. Far from being an "improvident tactical maneuver", the Petition by Kidder Peabody to this Court was prompted by both foresight and forethought in its desire to have the substantive federal law of arbitration, as most recently articulated by the United States Supreme Court in *Byrd*, properly applied.

3. KIDDER PEABODY DOES NOT ASK THIS COURT TO OVERRULE WARE AS IT IS NEITHER APPLICABLE NOR CONTROLLING

Thomas contends (at page 15, line 3 of his Opposition) that "Ware involves virtually the same factual setting and legal issues as arises in the pending motion". However, an examination of the Complaint filed by Thomas on January 4, 1985 in the Los Angeles County Superior Court (a copy of which is attached as Exhibit "B" to the Petition to Compel Arbitration), will disclose that *it contains no California Labor Code claim*. Rather, it purports to assert claims for conversion, conspiracy to commit conversion, breach of fiduciary duty, and breach of contract. In contrast, *Ware* was a class action for declaratory relief and for payment of all vested units under a profit-sharing plan which contained a forfeiture of benefits provision. While it is the position of Kidder Peabody that *Ware* is readily distinguished and therefore does not apply or control in this action, it is urged that California Labor

Code § 229 is directly contrary to the Federal Arbitration Act and its enforcement is therefore inconsistent with *Moses H. Cone, Keating*, and *Byrd*.

4. CONCLUSION

In his attack on the jurisdiction of this Court, Thomas both misconstrues Kidder Peabody's Petition to Compel Arbitration and misapplies the rules of diversity jurisdiction. Kidder Peabody and Thomas are the *only* parties to the petition and their diversity of citizenship is unchallenged.

The resort by Kidder Peabody to this Court to obtain its arbitration rights is clearly understandable in the face of *Tonetti*. Rather than duplication of effort and judicial proceedings, Kidder Peabody seeks only the enforcement of its rights under the federal substantive law of arbitration.

Ware is neither applicable nor controlling. Rather, California Labor Code § 229 is contrary to the federal substantive law of arbitration as articulated by the United States Supreme Court in *Moses H. Cone, Keating*, and *Byrd*.

For the foregoing reasons, and for those set forth in its motion papers, Kidder Peabody urges that its Petition to Compel Arbitration be granted.

Dated: March 29, 1986

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

By PETER BROWN DOLAN
Attorneys for Petitioner
Kidder Peabody & Co., Inc.

EXHIBIT A

CERTIFIED FOR PUBLICATION

G000455

(Super. Ct. No. 39-75-80)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

LOUIS TONETTI,
Plaintiff and Respondent,
v.
STEPHEN L. SHIRLEY and
KIDDER, PEABODY & COMPANY, INC.,
Defendants and Appellants.

OPINION

APPEAL from a judgment of the Superior Court of Orange County, Phillip A. Petty, Judge. Reversed with directions.

Overton, Lyman & Prince, Peter Brown Dolan and William J. Coyne for Defendants and Appellants.

Rick L. Lund & Associates and Robert A. Curtis for Plaintiff and Respondent.

Stephen Shirley and Kidder, Peabody & Company, Inc. (collectively referred to as Kidder) appeal the trial court's order denying their petition to compel arbitration of a dispute between them and an employee. They argue the trial court erred in refusing to enforce the arbitration provision contained in the contract of employment.

* * * * * *

In March 1980, Louis Tonetti signed a New York Stock Exchange, Inc. Agreement (NYSE Agreement) and an American Stock Exchange, Inc. Application (AMEX Application) in connection with his employment as a stockbroker and investment analyst with Kidder. Both agreements contained provisions requiring arbitration of any dispute arising out of Tonetti's employment or termination. [1]

In August 1982, a dispute arose between the parties regarding Kidder's allegedly defamatory statements and writings referring to Tonetti's qualifications and performance as a stock broker and investment analyst. Tonetti filed suit against Kidder alleging libel, defamation, slander, and negligent and intentional infliction of emotional distress. Kidder responded by filing a motion for order staying proceedings and a petition for order compelling arbitration. The trial court denied both requests. Kidder appeals.

In *Graham* v. *Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, the California Supreme Court set forth guidelines for

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[1]Paragraph (d) of the NYSE Agreement reads: "Any controversy between me and any member or member organization arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and Rules then obtaining of the [New York Stock] Exchange."

Paragraph (10) of the AMEX Application provides: "I agree that any controversy between me and any member or member organization of the American Stock Exchange, Inc. arising out of my employment or termination or my employment by and with such member or member organization or any successor thereto shall be settled by arbitration at the instance of any such party in accordance with the Constitution and Rules then obtaining of the American Stock Exchange Inc. or, if the employer be a member or member organization of the New York Stock Exchange, Inc. in accordance with the Constitution and Rules of that Exchange."

determining whether an arbitration provision constitutes an unenforceable contract of adhesion. The court defined an adhesion contract as " 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]" (*Id.,* at p. 817.) A contract of adhesion is fully enforceable unless (1) it does not fall within the reasonable expectations of the weaker or "adhering" party, or (2) it is unconscionable. (*Id.,* at pp. 819-820.) These guidelines were adopted because "certain 'minimal levels of integrity' [must] be achieved if the arrangement in question is to pass judicial muster." (*Id.,* at p. 825.)

The trial court in the present case found arbitration was not "appropriate" in light of *Hope* v. *Superior Court* (1981) 122 Cal.App.3d 147. In *Hope,* the court considered the validity of an arbitration provision in an employment contract between a securities brokerage firm and two of its account executives. The court first held the employment contract was adhesive in nature due to the standardized employment application form and the requirement that an applicant must either adhere to the contract or reject it. (*Id.,* at p. 153.)

Next, the court held the arbitration provisions were unconscionable. The court reviewed the composition of the arbitral body as required by the New York Stock Exchange Rules and Constitution and concluded: "The New York Stock Exchange, and thus its board of directors, performs a variety of quasi-public functions; but insofar as the board of directors functions in disputes between member firms and their employees, it is presumptively biased in favor of management .... This is not to say that members of the board of directors are in fact biased, or that they would necessarily exercise their authority in a consciously biased fashion; it is to say that

the structure of governance of the exchange is such that there exists a presumptive *institutional* bias in favor of member firms and members who constitute the electoral constituency of the board." (*Id.,* at p. 154)

Furthermore, the court noted: "The presumption of bias does not disappear simply because the decisional power is delegated [to a panel of arbitrators]. Nor is the presumption dispelled by rules requiring the arbitrators to be persons not engaged in the securities business, or giving the nonmember one peremptory challenge, or granting the director of arbitration authority to disqualify an arbitrator. Evenhandedness could be assured by a procedure which permits selection of arbitrators by the parties to the dispute or, failing that, through the auspices of some truly neutral party. In the absence of such a procedure we must conclude, as in *Scissor-Tail,* that the arbitration procedures of the New York Stock Exchange fail to meet minimal levels of integrity." (*Id.,* at p. 154-155.)

Parr v. *Superior Court* (1983) 139 Cal.App.3d 440 reached the opposite conclusion. In *Parr,* the court applied the principles announced in *Scissor-Tail* and *Hope* and concluded an arbitration provision within an agreement between Merrill Lynch and a customer *was* enforceable. Because there was no indication that the customer in *Parr* was anything but an experienced and sophisticated businessman, and arbitration provisions are common in the commercial context (*Keating* v. *Superior Court* (182) 31 Cal.3d 584, 595, revd. in part on other grounds *Southland Corp. v. Keating* (1984) ____ U.S. ____, 79 L.Ed 2d 1), the court held the arbitration agreement was within the customer's reasonable expectations. (*Parr* v. *Superior Court* at p. 445-446.) The customer's argument that he had no notice of the arbitration provision was rejected. (*Ibid.*)

In concluding the provision was not unconscionable, the court held Merrill Lynch had effectively rebutted the presumption of institutional bias. (*Id.,* at pp. 446-447.) The court relied primarily on the Securities Exchange Commission's approval of the arbitration provision in reaching its conclusion. Specifically, the court stated: "The SEC is an agency of the federal government which bears as one of its most important duties the protection and enforcement of the public's interest in the area of securities. [Citations.] Without some basis for doing so, we are reluctant to find unconscionable procedures which have been approved by the SEC." (*Id.,* at p. 447.)

The court also noted the arbitration rules provided the customer with certain rights constituting the "minimum levels of integrity" required by *Scissor-Tail*. Those rights were the same rights held *not* to be sufficient to rebut the presumption in *Hope:* the right to a panel of arbitrators composed of a majority of members who are not from the securities industry, the right to peremptorily challenge one arbitrator, the right to a hearing and to present evidence, the right to counsel, and the right to a verbatim record. (*Ibid.*)

Finally, the *Parr* court relied on the strong public policy favoring arbitration in deciding to enforce the provision. Quoting *Scissor-Tail*, the court stated: "[E]nforcement of an agreement to arbitrate should be denied . . . only in the clearest of cases, i.e., when the applicable procedures essentially preclude the possibility of a fair hearing. In all other cases the matter should be permitted to proceed to arbitration. If, in the course of arbitration proceedings, the resisting party is actually denied a fair opportunity to present his position, ample means for relief are available through a subsequent petition to vacate the award. [Citations.]" (*Id.,* at p. 448, emphasis deleted.)

II

Here, as in *Parr, Hope,* and *Scissor-Tail,* we hold the agreements involved are contracts of adhesion. The contracts are standardized in form, they were drafted by a large corporation of vastly superior bargaining strength, and they were imposed upon all persons desiring employment with Kidder as a stock broker or investment analyst. (See *Graham* v. *Scissor-Tail, supra,* 28 Cal.3d at p. 817.)

For the reasons stated below, we also conclude Kidder has failed to rebut the presumption of institutional bias in favor of management as set forth in *Hope.* Thus the arbitration provisions are unenforceable. Because of our conclusion, we need not address whether the arbitration provisions fell within the reasonable expectations of Tonetti.

According to our reading of the New York Stock Exchange (NYSE) Constitution and Rules of the Board of Directors,[1] Tonetti is a "nonmember" of the NYSE. Thus, Article VIII, Section 6 of the NYSE Constitution entitled "Non-member Controversies" applies here. That section states: "Any controversy between a non-member and a member, allied member, member firm or member corporation, arising out of the business of such member, allied member, member firm or member corporation . . . shall be submitted for arbitration as provided in the Rules of the Board of Directors."

The Rules indicate that public controversies involving claims of more than $100,000 require an arbitration panel consisting of five arbitrators. (Rule 607.) At least three of the arbitrators must not be from the securities industry.

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[1]It is our understanding neither the NYSE Rules nor the Constitution were presented to the trial court. The Rules were first presented to this court at oral argument. We have obtained a copy of the Constitution by our own efforts.

(*Ibid.*) Controversies among members of the Exchange must be arbitrated by at least three but not more than five arbitrators where the amount in controversy exceeds $10,000. (Rule 633.) However, the rules do not specify the number of arbitrators required where the controversy is between a nonmember and a member, as in the present case.[2]

In upholding the enforceability of the arbitration provision in *Parr*, the court relied heavily on the requirement that a majority of the arbitrators were not allowed to be associated with the securities industry. This provision, combined with the other rights provided the public customer in the Rules, convinced the court that Merrill Lynch had rebutted the presumption of unconscionability. In addition, the court relied on the Securities Exchange Commission's approval of the arbitration provisions.

Here, however, Kidder has failed to sustain its burden of showing the NYSE Constitution and Rules are fair as applied to an employee of a member firm. On their face, the Rules appear to be designed to protect public customers. No evidence has been presented to indicate an employee is equally protected. Employees, as nonmembers, appear to be entitled to one peremptory challenge, representation by counsel, the right to a hearing and to present evidence, and the right to a verbatim record. (Rules 609, 614, 615, 621, 624.) It is unclear from the Rules whether

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[2]The *Hope* opinion indicates that nonmember controversies involving more than $100,000 are heard and determined by a panel of five arbitrators with a majority being persons not associated with the securities industry. The opinion relied on the NYSE Constitution and Rules applicable in July 1981. Article VIII, Section 6 of the Constitution was amended in November 1983. Because there is now no reference to the number of arbitrators required for nonmember controversies in either the Constitution or the Rules, we assume the 1983 amendment deleted the provisions referred to in *Hope*.

an employee is also entitled to a panel of arbitrators composed primarily of persons not associated with the securities industry. Because we cannot determine from the record before us whether an employee is protected from the presumption of institutional bias in favor of management, Kidder did not meet its burden of establishing the fairness of the arbitration procedure in the trial court. Consequently, we conclude the NYSE arbitration procedures "fail to meet the minimal levels of integrity" required by *Scissor-Tail*. Thus, the presumption of institutional bias established in *Hope* has *not* been rebutted, and the arbitration provisions are unconscionable and unenforceable.

However, this conclusion does not mean the parties are precluded from resolving their dispute by arbitration. In light of the strong public policy in favor of arbitration, we believe the parties are entitled to choose a different and acceptable forum for arbitration. As stated in *Scissor-Tail*: "The parties have indeed agreed to arbitrate, but in so doing they have named as sole and exclusive arbitrator an entity which we cannot permit to serve in that broad capacity. In these circumstances we do not believe that the parties should now be precluded from attempting to agree on an arbitrator who is not subject to the disabilities we have discussed." (*Graham* v. *Scissor-Tail, supra*, 28 Cal.3d at p. 831; see also *Richards* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1976) 64 Cal.App.3d 899, 906.)

Therefore, on remand the trial court should give the parties a reasonable opportunity to agree on a suitable arbitrator. If they are unable to agree, either party may petition the court to appoint a neutral arbitrator. (See Code Civ. Proc., § 1281.6.) If no arbitrator is agreed upon and neither party petitions for an appointed arbitrator, the matter should be resolved by the trial court.

The judgment is reversed and the cause is remanded to the trial court to proceed in accordance with this opinion. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

/s/ WALLIN
Wallin, J.

WE CONCUR:

/s/ TROTTER
Trotter, P. J.

/s/ CROSBY
Crosby, J.

EXHIBIT B
G000455
(Super. Ct. No. 39-75-80)

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

LOUIS TONETTI,
Plaintiff and Respondent,
v.
STEPHEN L. SHIRLEY and
KIDDER, PEABODY & COMPANY, INC.
Defendants and Appellants.

ORDER GRANTING REHEARING

THE COURT:

The petition of defendants and appellants Stephen L. Shirley and Kidder, Peabody & Co., Inc. for rehearing is granted.

The declaration of Morris filed with the petition is stricken as an improper attempt to augment the record and will not be considered on rehearing.

The parties are invited to brief the following issues:

1. Whether the doctrine of federal preemption renders state adhesion contract principles irrelevant, requiring us to look solely to federal law;

2. Whether the NYSE arbitration procedures applicable to nonmembers are unconscionable under federal law; and

3. Whether, on remand, the trial court should be given the authority to appoint a neutral arbitrator on petition of either party.

Appellants' opening brief shall be filed by April 22, 1985. Repondent's brief and appellants' reply brief shall be filed within the times prescribed by rule 16, subdivision (a), California Rules of Court.

/s/ WALLIN
Wallin, J.

WE CONCUR:

/s/ TROTTER
Trotter, P. J.

/s/ CROSBY
Crosby, J.

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Los Angeles, California 90071.

On 19 , I served the foregoing document described as

on interested party in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

BRUCE Gelber, Esq.
Law Offices of Julian B. Fensten
700 South Flower Street, 22nd Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on April 1, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

SANDY ARD	/s/
Type or Print Name	Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY, INCORPORATED
Petitioner,

VS.

KENNETH MORGAN THOMAS,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT KENNETH MORGAN THOMAS IN OPPOSITION TO MOTION FOR ORDER COMPELLING ARBITRATION AND STAYING PROCEEDINGS

Date: April 8, 1985
Time: 10:00 a.m.
Place: Courtroom 21

Respondent KENNETH MORGAN THOMAS hereby submits this Supplemental Brief in Opposition to the Motion for an Order Compelling Arbitration and for an Order Staying Proceedings.

I

PETITIONER's ARGUMENT REGARDING DIVERSITY OF CITIZENSHIP DISTORTS THE PLAIN LANGUAGE OF THE STATUTE, 9 U.S.C. § 4.

Petitioner has misconstrued the plain language of Section 4 of the Federal Arbitration Act (9 U.S.C. § 4), which statute provides that a petition to compel arbitration may be filed in a federal district court "*which, save for such agreement, would have jurisdiction under Title 28*

[28 USCS], in a civil action or in admiralty *of the subject matter of a suit arising out of the controversy between the parties . . .*" Section 4 of the Act specifically requires that there be a basis for federal jurisdiction over the underlying civil action. Petitioner is fully cognizant of the fact that this District Court would not have jurisdiction over the underlying civil action because there is no diversity of citizenship between plaintiff KENNETH MORGAN THOMAS (the respondent herein) and petitioner's co-defendants, BARCLAY PERRY and JAMES JOHNSTON. Petitioner does not dispute the sworn statement of respondent THOMAS that he is a resident of the same State of California as are petitioner's co-defendants, PERRY and JOHNSTON.

Petitioner cites no authority which supports its ploy of manufacturing diversity of citizenship by deleting all reference to its co-defendants in the State Court action (defendants PERRY and JOHNSTON) who had been named and served and who had filed an Answer jointly with petitioner KIDDER, PEABODY in the State Court action. Such strategy does not overcome the requirements of federal law, 9 U.S.C. § 4.

II

PETITIONER'S BRIEF IGNORES THE PRIMARY FACTORS WHICH ARE CONSIDERED IN DETERMINING WHETHER A FEDERAL ACTION SHOULD BE DISMISSED IN FAVOR OF PARALLEL AND DUPLICATE STATE COURT PROCEEDINGS.

The United States Supreme Court has delineated the four major factors which must be evaluated in determining whether to dismiss a federal action in favor of parallel action in the State Court. *Colorado River Water Conserva-*

tion District v. United States, 424 U.S. 800 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction,* 460 U.S. 1 (1983). These factors were discussed in the Opposition Brief filed by respondent on March 25, 1985, wherein it was pointed out that the applicable factors weighed heavily in favor of dismissal of the federal action. (See Opposition Brief at Pages 11-14.) Petitioner's Brief ignores these primary factors — in particular, petitioner seeks to misdirect this Court's attention from the fact that this federal action merely duplicates and shadows the State Court proceedings wherein the identical issues are involved. This same petitioner has already filed a Motion to Stay Proceedings in the State Court. There is no reasonable justification for this doubling of paperwork and duplication of proceedings.

Petitioner KIDDER, PEABODY'S only response in this regard is that the California Court of Appeal ruled against petitioner in the recent decision handed down in *Tonetti v. Shirley and Kidder, Peabody & Company, Inc.* (Said opinion is set forth at Exhibit "A" to Petitioner's Reply Brief). Astoundingly, petitioner has the temerity to suggest that an unfavorable ruling to KIDDER, PEABODY in the *Tonetti* case is tantamount to incompetency by the state courts of California to apply the law. It is noteworthy that petitioner has submitted no declarations nor affidavits nor evidence of any kind to support its self-serving assessment of the California judiciary other than the gratuitous statements of its own counsel. The fact that the courts, including the United States Supreme Court, will not enforce the purported arbitration agreement as it applies to this case reflects a judicial determination that it is unfair, oppressive, unconscionable, presumptively biased in favor of management, and fails to satisfy the minimum standards of integrity. *See Ware, Hope* and *Tonetti, supra.* As discussed in the original

Opposition Brief, said arbitration procedures are unfair because (a) the selection of arbitrator by the New York Stock Exchange is presumptively biased in favor of management and (b) the lack of discovery available under the rules of the said Exchange is inherently unfair. In response, petitioner offers nothing but the gratuitous and self-serving comments of its own counsel.

III

THE COMPLAINT ON FILE IN THE UNDERLYING CIVIL ACTION IS CLEARLY BASED ON THE WRONGFUL DENIAL OF WAGES; THUS, IN ACCORDANCE WITH THE UNANIMOUS SUPREME COURT RULING IN *WARE* BASED ON CALIFORNIA LABOR CODE § 229, RESPONDENT'S CIVIL ACTION FOR THE WRONGFUL DENIAL OF WAGES IS NOT SUBJECT TO COMPULSORY ARBITRATION

As amply demonstrated by the Complaint on file with the State Court in the underlying civil action (a copy of which is attached as Exhibit "B" to the Petition to Compel Arbitration), this lawsuit arose over the wrongful denial of wages. Said wrongful denial of wages is the basis of each cause of action set forth in said Complaint.

The fact that this lawsuit arose over the wrongful denial of wages is further established by the sworn statements in the Declaration of Kenneth Morgan Thomas filed on March 25, 1985, and petitioner offers no evidence whatsoever to challenge respondent's sworn averment in this regard.

Thus, it is uncontroverted that the pending action concerns the wrongful denial of wages. *Labor Code* § 229 concerns the wrongful denial of wages. Section 229 expresses California law in this regard, and the validity of *Labor Code* § 229 was tested before the United States Supreme Court in *Ware* under virtually identical circumstances. The Supreme Court ruled that *Labor Code* § 229 prevailed over the Federal Arbitration Act. The *Ware* opinion contains an extensive discussion of the legislative history behind the conflicting statutes. The Court noted that California has manifested a strong policy of protecting its wage earners from undesirable economic pressures: in particular, pressures from an exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress where wages have been wrongfully denied. (*Ware,* 414 U.S. at 139-40.) The Supreme Court also examined the legislative intent behind the Federal Arbitration Act and concluded that Congress intended that state policies to protect wage earners (i.e., *Labor Code* § 229) "should operate *vigorously.*" (414 U.S. at 140.)

Petitioner cites no authority for the novel proposition that a civil action for the wrongful denial of wages must be brought under *Labor Code* § 229. Petitioner's argument is akin to claiming that an action for negligence or breach of contract must identify the section in the California *Civil Code* which expresses California law in that regard. Petitioner's argument, based on this phantom distinction, is frivolous in the extreme and cannot justify counsel's failure to bring the *Ware* case to this Court's attention.

In a glib, one-line comment, petitioner suggests that *Ware* is no longer good law. Petitioner submitted no legal analysis and no discussion of the three cases (*Moses H. Cone, Keating,* and *Byrd*) which, according to petitioner, purport to overrule *Ware.* Said cases cited by petitioner do not concern *Labor Code* § 229 or the wrongful denial of

wages, nor do any of petitioner's cases suggest that *Ware* is not good law. *Ware* was not a close decision — *it was a unanimous decision.* The principle of *stare decisis* is not as flimsy as petitioner portrays it.

CONCLUSION

WHEREFORE, for all the reasons stated herein and for those reasons set forth in the original Opposition Brief, it is respectfully submitted that there is no merit to the pending motions, and it is hereby requested that the Cross-Motion of Respondent Kenneth Morgan Thomas to dismiss the federal action be granted along with an award of costs and disbursements for responding to the Petition and pending Motion.

Dated: April 3, 1985

Respectfully submitted,
JULIAN B. FENSTEN
A Professional Corporation

By BRUCE GELBER
Attorneys for Respondent
Kenneth Morgan Thomas

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower Street, 22nd Floor, Los Angeles, California 90017.

On March 4, 1985, I serve the foregoing document described as SUPPLEMENTAL BRIEF OF RESPONDENT KENNETH MORGAN THOMAS IN OPPOSITION TO MOTION FOR ORDER COMPELLING ARBITRATION AND STAYING PROCEEDINGS on Interested party in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, California, 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail Executed on March 4, 1985,

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANA PARRA

Signature

Case No. CV 85-1257 RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

April 4, 1985

KIDDER, PEABODY & CO. v. KENNETH THOMAS

Hon. Robert J. Kelleher, Judge

James Kimball, Deputy Clerk

CIVIL MINUTES — GENERAL

This Court had matters from the above captioned case set for hearing on April 8, 1985 at 10:00 a.m. Said matters now stand submitted, with a decision and order to be issued by this Court forthwith.

So Ordered.

Maren Nelson
550 South Flower St.
Sixth Floor
Los Angeles, CA 90071

Julian Fensen
700 South Flower St.
22nd Floor
Los Angeles, CA 90017

Case No. CV 85-1257 RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

April 9, 1985

KIDDER, PEABODY & CO. v. KENNETH THOMAS

Hon. Robert J. Kelleher, Judge

James A. Kimball, Deputy Clerk

CIVIL MINUTES — GENERAL

This Court hereby orders the parties to submit in writing by April 17 the results of the motion for order staying proceedings and the petition for order compelling arbitration in the case of *Kenneth Morgan Thomas v. Kidder, Peabody and Co., Barclay Perry, James Johnston*, C 529105, Superior Court of the State of California for the County of Los Angeles scheduled for April 5.

So Ordered.

Maren Nelson	Julian Fensen
550 South Flower St.	700 South Flower St.
Sixth Floor	22nd Floor
Los Angeles, CA 90071	Los Angeles, CA 90017

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY, INCORPORATED
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

RESPONSE TO ORDER OF COURT DATED APRIL 9, 1985

Pursuant to Order of Court dated April 9, 1985, attached hereto and incorporated herein by this reference as Exhibit "A" are the results of the Motion for Order Staying Proceedings and the Petition for Order Compelling Arbitration in the case of *Kenneth Morgan Thomas v. Kidder, Peabody & Company, Barclay Perry, and James Johnston,* C 529105, which had been heard by the Superior Court of the State of California on April 5, 1985.

DATED: April 12, 1985

Respectfully submitted,

JULIAN B. FENSTEN
A Professional Corporation

By: BRUCE GELBER
Attorneys for Respondent

EXHIBIT A

C 529105

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

KENNETH MORGAN THOMAS

vs

KIDDER PEABODY & Co., etc., et al.

April 10, 1985

Honorable Robert H. O'Brien, Judge

I. Brown, Deputy Clerk

Motion of defendants Kidder, Peabody & Co., Inc., Barclay Perry and James Johnston for order staying proceedings and for order compelling arbitration.

In this matter heretofore taken under submission, the Court now rules as follows:

Motion is denied.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware, 414 U.S. 117 is the controlling authority here. *Southland Corp. v. Keating* related to Corporation Code Sect. 31512, part of the California Franchise Investment Law and *Dean Witter v. Byrd* concerned federal securities claims by a customer against a securities broker. Neither case involved California's "strong policy of protecting its wage earners . . . from undesirable economic pressures", as in *Ware.*

Counsel for responding party to give notice.

Counsel notified by U.S. mail.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 South Flower Street, 22nd Floor, Los Angeles, California 90017.

On April 12, 1985, I served the foregoing document described as Response to Order to Court Dated April 9, 1985 on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on April 12, 1985, at Los Angeles, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DIANE PHILLIPS

Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO. INCORPORATED
Petitioner,
vs.
KENNETH MORGAN THOMAS,
Respondent.

STATUS REPORT OF LOS ANGELES COUNTY SUPERIOR COURT ACTION

By its Minute Order of April 9, 1985, the Court ordered the parties to this action to submit in writing by April 17 the results of the Motion for Order Staying Proceedings and the Petition for Order Compelling Arbitration in the case of *Kenneth Morgan Thomas v. Kidder, Peabody & Co., Barclay Perry, James Johnston* pending in the Superior Court of the State of California for the County of Los Angeles under Case No. C 529105 and scheduled for hearing on April 5, 1985. Petitioner submits its report as follows:

At the oral argument on the Motion and Petition in Department 81 of the Los Angeles County Superior Court, before the Honorable Robert H. O'Brien, Judge presiding, on Friday, April 5, 1985, it was urged by counsel for Kidder, Peabody & Co. Incorporated ("Kidder Peabody"), Barclay Perry ("Perry") and James Johnston ("Johnston") that the authority of *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, 33 L.Ed.2d 348, 94 S.Ct. 383 (1973) had been superseded by the authority of *Southland Corp. v. Keating*, 79 L.Ed.2d 1 (1984). Specifically, it was urged that the analysis set forth in footnote 11 of *Keating*, commencing at page 15, demonstrates that the current view of the

United States Supreme Court is that a state legislature *has no authority* to create an exception to Section 2 of the federal Arbitration Act (9 U.S.C. § 2) and that California Labor Code § 229, while apparently creating a defense to arbitration, is *not* a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Labor Code. [Emphasis added].

Attached hereto as Exhibit A is a copy of the Minute Order, dated April 10, 1985, by which the Los Angeles County Superior Court denied the Motion of defendants Kidder Peabody, Perry and Johnston for an Order Staying Proceedings and the (Petition) of Perry and Johnson for an Order Compelling Arbitration.

Attached hereto as Exhibit B is a copy of the Request for Statement of Decision [C.C.P. § 1291] which has been filed by Perry and Johnston in the Los Angeles County Superior Court action.

It remains the position of Kidder Peabody that even if *Ware* is deemed by this Court to be the controlling authority and that it is undisturbed by *Keating*, California Labor Code § 229 has no application to the Conversion, Conspiracy to Commit Conversion, Breach of Fiduciary Duty, Breach of Contract, and Exemplary and Punitive Damage claims asserted by plaintiff Kenneth Morgan

Thomas ("Thomas") in his Complaint in the Los Angeles Superior Court action.

Dated: April 16, 1985.

Respectfully submitted,

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

BY PETER BROWN DOLAN
Attorneys for Petitioner
Kidder, Peabody & Co.
Incorporated

(Exhibits Omitted)

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On April 16, 1985, I served the foregoing document described as STATUS REPORT OF LOS ANGELES COUNTY SUPERIOR COURT ACTION on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JULIAN B. FENSTEN, A Professional
Corporation
BRUCE GELBER, ESQ.
700 South Flower Street, 22nd Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on April 16, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL — Type or Print Name

/s/ — Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO. INCORPORATED,
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

RESPONSE AND OBJECTION TO PETITIONER'S STATUS REPORT

By its Minute Order of April 9, 1985, the Court ordered the parties to submit in writing *the results* of the Motion for Order Staying Proceedings and the Petition for Order Compelling Arbitration in the parallel litigation in the Superior Court of the State of California, case entitled *Kenneth Morgan Thomas vs. Kidder, Peabody & Co., Barclay Perry, James Johnston*, C 529105.

On April 12, 1985, Respondent filed a copy of the results of the motions pending in the State Court, wherein the Court ruled that the said motions were denied on the basis (a) that the controlling authority is the decision of the Supreme Court of the United States in *Merrill Lynch Pierce Fenner & Smith, Inc. vs. Ware*, 414 U.S. 117 (1973), and that (b) the cases relied on by Kidder, Peabody were inapplicable. For easy reference, an additional copy of the State Court's ruling is attached hereto as Exhibit "A".

On April 16, 1985, Petitioner filed its status report of the results of the State Court proceedings (even though these results had been filed with this Court). However, rather than confining its response to the results as or-

dered by this Court, Petitioner has now seized the opportunity to re-argue its position. Petitioner's arguments were completely rejected by the State Court because the cases which Kidder, Peabody relied on had no bearing on *Labor Code* § 229 and the facts of this case. The United States Supreme Court's ruling in *Ware* was a *UNANIMOUS*, 8-0 decision; and, in response to questioning from the Court, Kidder, Peabody's counsel conceded that he knew of no cases which overruled *Ware*.

Likewise, the State Court rejected Kidder, Peabody's argument regarding the application of California *Labor Code* § 229 to the facts of this case; and, similar to the motion before this Court, Petitioner submitted no affidavits or declarations with the State Court to support its claims. The Court considered the factual averments in the Complaint which clearly showed that the *wrongful denial of wages* underpinned and formed the basis of each and every cause of action in the Complaint. Plaintiff seeks compensatory and punitive damages because the manner in which his wages were denied was arbitrary and oppressive, which damages directly flow from the same wrongful conduct.

If Petitioner's counsel truly believed that *Ware* has been overruled by *Keating*, counsel would have cited *Ware* in his opening memorandum and would have attempted to distinguish this controlling case or show why it was not applicable — but *Ware* was not discussed nor even cited in total disregard for the principle of *stare decisis*.

Petitioner is apparently seeking to delay the ruling of this Court by its reference to the Request for Statement of Decision [C.C.P. § 1291] filed in the State Court proceedings. C.C.P. § 1291 incorporates the provisions of C.C.P. § 632 and, thus, applies only to the trial of a *question of fact* by the Court. In the State Court proceed-

ings, no question of fact was raised, nor did Kidder, Peabody file any affidavits or declarations regarding any such disputed facts. The State Court set forth in detail the legal basis for its decision: that *Ware* is controlling in this case, and that *Keating* and *Byrd* do not concern wages and do not involve California's "strong policy of protecting its wage earners .... from undesirable economic pressures", as in *Ware* (see Exhibit "A").

Thus, Kidder, Peabody can show neither a factual basis nor a legal basis for its demand on the State Court for a further statement of decision.

DATED: April 18, 1985

Respectfully submitted,

JULIAN B. FENSTEN
A Professional Corporation

By BRUCE GELBER
Attorneys for Respondent

(Exhibit Omitted)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 South Flower Street, 22nd Floor, Los Angeles, CA 90017.

On April 18, 1985, I serve the foregoing document described as Response and Objection to Petitioner's Status Report on Petitioner in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, CA 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on April 18, 1985, at Los Angeles, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DIANE PHILLIPS

Signature

CV 85-1257 RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY AND CO., INC.

v.

KENNETH MORGAN THOMAS

Hon. Robert J. Kelleher, *Judge*

James A. Kimball, *Deputy Clerk*

CIVIL MINUTES — GENERAL

April 25, 1985

The Court, having taken petitioner's motion for order compelling arbitration and motion for order staying proceedings set for hearing April 8, 1985 under submission hereby orders said motions DENIED.

The Court orders respondent's cross-motion to dismiss petition to compel arbitration which was brought in federal court scheduled for hearing April 8, 1985 GRANTED.

So ordered.

Attorneys for petitioner
Maren E. Nelson
550 S. Flower St., 6th Fl.
Los Angeles, CA 90071

Attorney for respondent
Julian B. Fensten
700 S. Flower St., 22nd Fl.
Los Angeles, CA 90017

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO., INCORPORATED,
Petitioner,

vs.

KENNETH MORGAN THOMAS,
Respondent.

FURTHER RESPONSE TO DISTRICT COURT'S REQUEST FOR STATUS OF STATE COURT PROCEEDINGS

Respondent hereby submits this further response to the Minute Order of April 9, 1985, regarding the status of the parallel litigation in the Superior Court of the State of California.

Attached hereto as Exhibit "A" is the Proposed Statement of Decision issued by the Superior Court and filed on April 23, 1985, wherein said Court followed the *unanimous* (8-0) decision of the United States Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973).

The Superior Court noted that Kidder, Peabody's counsel stipulated that the "commissions" at issue in this case are "wages" for purposes of applying California *Labor Code* § 229. The Court further found that respondent's causes of action for conversion, civil conspiracy and breach of fiduciary duty do not change the nature of this civil action into something other than an action by an employee seeking different remedies for alleged wrongful withholding of commissions, and that said claims may

properly be asserted along with the basic action for commissions.

DATED: April 29, 1985

JULIAN B. FENSTEN
A Professional Corporation

By BRUCE GELBER
Attorneys for Respondent

(Exhibit Omitted)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 700 S. Flower Street, 22nd Floor, Los Angeles, California 90017.

On April 29, 1985, I served the foregoing document described as FURTHER RESPONSE TO DISTRICT COURT'S REQUEST FOR STATUS OF STATE COURT PROCEEDINGS on Petitioner in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

OVERTON, LYMAN & PRINCE
550 South Flower Street, Sixth Floor
Los Angeles, California, 90071

Attention: Maren E. Nelson

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on April 29, 1985, at Los Angeles, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

DIANE PHILLIPS
Signature

Case No. 85-1257 RJK (Px)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & CO. INCORPORATED,
Petitioner,

vs.

KENNETH MORGAN, THOMAS,
Respondent.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Kidder, Peabody & Co. Incorporated, petitioner above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order, denying the Motion for Order Compelling Arbitration and the Motion for Order Staying Proceedings and dismissing the Petition to Compel Arbitration, entered in this action on the 26th day of April, 1985.

Pursuant to Local Rule 17.1, the (a) names of all parties to the Order; and the (b) names and addresses of the attorneys for each party are as follows:

Petitioner: Kidder, Peabody & Co. Incorporated

Attorneys for Petitioner:

Overton, Lyman & Prince
Peter Brown Dolan P.C.
Maren E. Nelson
550 South Flower Street, Sixth Floor
Los Angeles, California 90071
Telephone: (213) 683-1100

Respondent: Kenneth Morgan Thomas

Attorneys for Respondent:
Julian B. Fensten
A Professional Corporation
Bruce Gelber
700 South Flower Street
Twenty-Second Floor
Los Angeles, California 90017
Telephone: (213) 488-0660

Dated: May 24, 1985.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
MAREN E. NELSON

BY PETER BROWN DOLAN
Attorneys for Petitioner
Kidder, Peabody & Co.
Incorporated

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 550 South Flower Street, Sixth Floor, Los Angeles, California 90071.

On May 24, 1985, I serve the foregoing document described as NOTICE OF APPEAL on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JULIAN B. FENSTEN,
A Professional Corporation
BRUCE GELBER
700 South Flower Street
Twenty-Second Floor
Los Angeles, California, 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on May 24, 1985, at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on , , 19 , at , California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINE SIEGEL — Type or Print Name

/s/ — Signature

No. 85-5935
D.C. No. 85-1257 RJK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIDDER, PEABODY & COMPANY, INCORPORATED,
Plaintiff/Appellant,

v.

KENNETH MORGAN THOMAS,
Defendant/Appellee.

Before: SCHROEDER and NORRIS, Circuit Judges, and SOLOMON,* District Judge

Submission of this case is hereby vacated.

The case is remanded to the district court for 21 days for the limited purpose of clarifying the ground or grounds upon which the district court granted appellee Thomas' cross-motion to dismiss. Specifically, the panel wishes to have the record clarified as to whether the district judge exercised his discretion to dismiss under the *Colorado River* abstention doctrine (*see Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983)), and, if so, the reasons for his exercise of discretion.

The case will then be resubmitted without any further order from this court.

---

*The Honorable Gus J. Solomon, Senior United States District Judge for the district of Oregon, sitting by designation.

No. CV 85 1257 RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIDDER, PEABODY & COMPANY INCORPORATED,

Plaintiff,

v.

KENNETH MORGAN THOMAS, *Defendant.*

ORDER

The Court hereby clarifies its order of April 25, 1985. By that order, this Court did not stay proceedings by exercise of its discretion under the *Colorado River* abstention doctrine. Rather, it issued a final order of dismissal on the ground that the Statement of Decision filed April 23, 1985 in the Superior Court of the State of California for the County of Los Angeles, Robert H. O'Brien, Jr., is entitled to preclusive effect. *See Southern Pacific Transportation Co. v. P.U.C. of the State of California,* 716 F.2d 1285, 1289 (9th Cir. 1983). That state court decision ruled that plaintiff therein (defendant herein) was entitled to pursue his court action without regard to the arbitration agreement.

The Clerk shall send, by United States mail, a copy of this Order to counsel for the parties.

DATED: September 29, 1986.

ROBERT J. KELLEHER
Senior District Judge

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 15, 1987, I served the within Joint Appendix in re: "Barclay Perry and Kenneth Morgan Thomas" in the United States Supreme Court, October Term 1986, No. 86-566; on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Bruce Gelber
Julian B. Fensten,
A Professional Corporation
700 South Flower Street
Los Angeles, California 90017

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 15, 1987, at Los Angeles, California

C. C. Medina

CE CE MEDINA

APPELLANT'S BRIEF

FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-566

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,

Appellants,

VS.

KENNETH MORGAN THOMAS,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District Division Five

BRIEF OF APPELLANTS

PETER BROWN DOLAN
Counsel of Record for Appellants
MAREN E. NELSON
CHRISTINE H. SIEGEL
OVERTON, LYMAN & PRINCE
550 South Flower Street
Sixth Floor
Los Angeles, California 90071
Telephone: (213) 683-1100

January 14, 1987

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QUESTIONS PRESENTED

Section 2 of the United States Arbitration Act ("Arbitration Act"), ch. 392, 61 Stat. 670, 9 U.S.C. § 2, mandates the enforcement of arbitration agreements, and withdraws from the states the power to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration. *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Further, where arbitrable claims are intertwined with non-arbitrable claims, courts are required to order the arbitrable claims to arbitration. *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). California Labor Code § 229 provides, in relevant part, that "actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973), held that the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*111* (" '34 Act"), as then in effect, did not preempt California Labor Code Section 229.

The questions therefore presented are:

(1) Whether California Labor Code § 229 is preempted by § 2 of the Arbitration Act, thereby precluding an employee from bringing an action in the Superior Court of the State of California to collect wages, if his wage claim is otherwise referrable to arbitration under an agreement between the parties;

(2) Whether California Labor Code § 229 is preempted by the '34 Act as currently enacted;

(3) Whether claims for conversion, civil conspiracy, and breach of fiduciary duty arising from a

denial of wages are arbitrable if joined with a claim for wages, where these non-wage claims are otherwise referrable to arbitration under an agreement between the parties.

PARTIES AND AFFILIATED CORPORATIONS

The parties to this proceeding and their affiliated corporations are the following:

Kenneth Morgan Thomas;
Barclay Perry;
James Johnston; and
Kidder, Peabody & Co., Incorporated,

which is a wholly-owned subsidiary of Kidder, Peabody Group, Inc. General Electric Financial Services, Inc. owns eighty percent of the stock of Kidder, Peabody Group, Inc., and is a wholly-owned subsidiary of General Electric Corporation.

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No. 86-566

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,
Appellants,

VS.

KENNETH MORGAN THOMAS,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District Division Five

BRIEF OF APPELLANTS

OPINIONS BELOW

The Statement of Decision of the Superior Court of the State of California for the County of Los Angeles ("Superior Court"), dated April 23, 1985, denying appellants' Petition for Order Compelling Arbitration ("Arbitration Petition"), and Motion for Order Staying Proceedings ("Stay Motion"), is not reported and is reprinted in the Joint Appendix ("J.A.") at 128a-129a.

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five ("Court of Appeal"), dated April 10, 1986, affirming the

Statement of Decision of the Superior Court, is not reported and is reprinted at J.A. 139a-142a.

The Order of the Court of Appeal, dated May 6, 1986, denying appellants' Petition for Rehearing, is not reported and is reprinted at J.A. 143a.

The Order of the Supreme Court of the State of California ("Supreme Court of California") Denying Review after Judgment by the Court of Appeal, dated July 10, 1986, is not reported and is reprinted at J.A. 144a.

JURISDICTION

The Opinion of the Court of Appeal affirming the Statement of Decision of the Superior Court is dated April 10, 1986. The Order of the Court of Appeal denying appellants' Petition for Rehearing is dated May 6, 1986. The Order of the Supreme Court of California, the highest court from which an appeal may be taken, denying review of the April 10, 1986 decision of the Court of Appeal, is dated July 10, 1986.

The Notice of Appeal to this Court was timely filed in the Court of Appeal on September 15, 1986. This Appeal was docketed in this Court within ninety days from the Order of the Supreme Court of California, denying review after judgment by the Court of Appeal. *American Railway Express Co. v. Levee,* 263 U.S 19, 20-21, 44 S.Ct. 11, 12, 68 L.Ed. 140, 143 (1923).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). *See also Southland Corp. v. Keating,* 465 U.S. at 6-7, 104 S.Ct. at 856-57, 79 L.Ed. 2d at 9-10. This Court noted probable jurisdiction on December 1, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

U.S. Constitution, Article VI, Clause 2 (*Supremacy Clause*):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 2):

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 3):

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitra-

tion has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

California Labor Code § 229:

"Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement."

New York Stock Exchange, Inc. Rule 347:

"Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

Securities Exchange Act of 1934, Section 19(c), ch. 404, 48 Stat. 898 (1934) (codified as amended at 15 U.S.C. § 78s(c) (1975)):

"(c) The Commission, by rule, may abrogate, add to, and delete from . . .the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or

otherwise in furtherance of the purposes of this chapter. . . ."

STATEMENT OF THE CASE

Appellee, Kenneth Morgan Thomas ("Thomas") is a former employee of Kidder, Peabody & Co. Incorporated ("Kidder, Peabody"), a broker/dealer of securities. Appellants Barclay Perry ("Perry") and James Johnston ("Johnston") are also employees of Kidder, Peabody.

On or about August 23, 1982, in connection with his application for employment by Kidder, Peabody, Thomas executed a Uniform Application for Securities Industry Registration on Form U-4 ("Form U-4") which is reprinted at J.A. 30a-33a. Form U-4 provides, at paragraph 5, that:

"I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . ."

Among the organizations with which Thomas registered was the New York Stock Exchange, Inc. ("N.Y.S.E."). Rule 347 of the N.Y.S.E. provides that "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

In May 1984, a dispute arose between Thomas, on the one hand, and Perry, Johnston, and Kidder, Peabody, on the other hand, concerning certain commissions allegedly

owed to Thomas by Kidder, Peabody which were instead paid to Johnston. On January 4, 1985, Thomas filed a Complaint in the Superior Court against Kidder, Peabody, Perry and Johnston. The Complaint is reprinted at J.A. 1a-13a. The Complaint seeks $40,000.00 for breach of contract to pay commissions and $150,000.00 in actual damages for conversion, civil conspiracy, and breach of fiduciary duties. The Complaint also prays for exemplary and punitive damages.

In response to Thomas' Complaint, Perry and Johnston demanded arbitration of Thomas' claims against them. Thomas refused to submit the dispute to arbitration, and accordingly, Perry and Johnston filed a Stay Motion and an Arbitration Petition in the Superior Court. The Stay Motion and the Arbitration Petition were based on the ground that Thomas had entered into a written agreement with Kidder, Peabody to arbitrate the controversies asserted in the Complaint, which agreement was for the benefit of Perry and Johnston. Thomas' claims against Kidder, Peabody were not addressed by the Arbitration Petition.[1]

Thomas opposed the Stay Motion and the Arbitration Petition, arguing that his claims were for wages and were therefore exempt from arbitration under California Labor Code, ("Labor Code"), § 229, and arguing that this Court

[1]Kidder, Peabody instead filed a separate Petition to Compel Arbitration in the United States District Court for the Central District of California, based on the Arbitration Act and the diversity of citizenship between it and Thomas. That Petition was denied by the District Court, and the issue is the subject of an appeal pending in the United States Court of Appeals for the Ninth Circuit entitled *Kidder, Peabody & Co. Incorporated v. Kenneth Morgan Thomas*, Docket No. 85-5935. The pleadings and opinions filed in the District Court and the Court of Appeals are reprinted at J.A. 146a-245a.

so held in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973).

A hearing on the Stay Motion and the Arbitration Petition was held on April 5, 1985. After hearing argument by counsel for the parties, the Superior Court, on April 23, 1985, filed its Statement of Decision which provides, in relevant part, as follows:

> "The within action is fundamentally an action to recover commissions allegedly earned as an employee of defendant. Counsel stipulated,[2] and this Court so finds, that 'commissions' as used in this case are 'wages' as used in Labor Code Section 229. The ancillary causes of action for conversion, civil conspiracy and breach of fiduciary duty do not change this action into something other than one by an employee seeking different remedies for alleged wrongful withholding of commissions. The alleged claims over and above the commissions sought arise, if at all, from defendants' actions in withholding the commissions and thus may properly be asserted along with the basic action for commissions.
>
> *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, controlling authority here, holds that in accordance with California Labor Code Section 229, actions to collect wages may be pursued without regard to private arbitration agreements. Accordingly, the within petition to compel arbitration and companion motion to stay proceedings in accordance with the private arbitration agreement between plaintiff and defendant are denied." [Footnote omitted.]

[2]Counsel for appellants stipulated that "commissions" are included in the definition of "wages" set forth in California Labor Code Section 200.

Perry and Johnston appealed to the Court of Appeal, on the grounds that the Arbitration Act preempted Labor Code § 229; that the arbitration agreement was enforceable; and that the claims for conversion, civil conspiracy and breach of fiduciary duty should be submitted to arbitration, even if the wage claims were non-arbitrable, citing *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

On April 10, 1986, the Court of Appeal affirmed the trial court's decision. The Court of Appeal stated that Thomas' action was an action for wages. Further, the Court of Appeal held that this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973), controlled, and that because Thomas' wage claim was not severable from his tort claims, his tort claims need not be submitted to arbitration under *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

Perry and Johnston filed a Petition for Rehearing in the Court of Appeal, which was denied May 6, 1986 without opinion.

Perry and Johnston filed a Petition for Review in the Supreme Court of the State of California. That Court declined to review the judgment by the Court of Appeal, by Order dated July 10, 1986.

Perry and Johnston then filed a Notice of Appeal and Jurisdictional Statement with this Court. This Court noted probable jurisdiction on December 1, 1986.

SUMMARY OF ARGUMENT

Labor Code § 229 has been preempted, under Article VI, Clause 2, of the United States Constitution, by both the Arbitration Act and the '34 Act.

Under the terms of the Arbitration Act, agreements to arbitrate commercial disputes involving interstate commerce are "valid, irrevocable and enforceable." 9 U.S.C. § 2. The Arbitration Act creates "a body of federal substantive law of arbitrability" that favors arbitration agreements, "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983). Likewise, the Arbitration Act "*withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration* . . . . [There are] only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of . . . a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' [*There is*] *nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.*" *Southland Corp. v. Keating,* 465 U.S. 1, at 10-11; 104 S.Ct. 852, 858, 79 L.Ed.2d 1, 12 (1984) [Emphasis supplied].

Labor Code § 229, to the extent that it may grant a private right of action to an individual,[3] attempts to block

[3]The courts below have rendered their opinions on the erroneous assumption that Thomas, as a private individual, has standing to bring an action under Labor Code § 229. That Section refers to "actions" to *enforce* the provisions of this article." "This article" refers to Article 1, which governs the payment of wages to employees in general occupations. Labor Code § 217 provides that the California Division of Labor Law Enforcement shall institute actions to *enforce* the payment of wages. Labor Code § 218 provides that the article shall not limit the right of a wage claimant to sue directly for wages. Thus, although Article 1 does not preclude an employee from suing

the enforcement of arbitration agreements. This anti-arbitration provision applies regardless of whether the arbitration agreement was willingly executed by persons having legal capacity, and regardless of whether the agreement provides for a fair and impartial resolution of the parties' dispute. The case at bar involves a contract in interstate commerce. Accordingly, under the Supremacy Clause, the California statute must give way to the federal policy favoring arbitration.

Labor Code § 229 has also been preempted by the '34 Act. The '34 Act, as currently enacted, gives the Securities and Exchange Commission ("S.E.C."), the authority to review rules such as (N.Y.S.E.) Rule 347 providing for the arbitration herein. This Court, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973), suggested that N.Y.S.E. Rule 347 would preempt state law if it were subject to review by the S.E.C., under the S.E.C.'s statutory grant of authority. *See, Id.,* at 139; 94 S.Ct. at 395; 38 L.Ed.2d at 366. In 1975, after *Ware* was decided, Congress amended Rule 19(c) of the '34 Act, 15 U.S.C. § 78s(c), to expressly provide for S.E.C. review of all N.Y.S.E. Rules, including Rule 347. *See,* S.Rep.No. 94-75, Ninety-Fourth Congress, First Session, 27-28, 31 (1975). In so doing, Congress clearly provided for the sort of review this Court contemplated in *Ware,* evidencing its manifest intent to preempt state statutes such as Labor Code § 229.

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privately, it is intended to establish a public enforcement mechanism for the benefit of employees who cannot or do not sue privately for their wage claims. Labor Code § 229 is therefore addressed to the powers of the Division of Labor Law Enforcement, rather than the rights of a private claimant such as Thomas. *See also* Feldman, "Arbitration Modernized: The New California Arbitration Act," 34 So. Cal. L. Rev. 413, 418 (1961).

Finally, even if Labor Code § 229 were not preempted, the decision of the Court of Appeal must be reversed with respect to the intertwined non-wage claims, under the express holding by this Court in *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). The Arbitration Act "requires district courts to compel arbitration of pending arbitrable claims where one of the parties files a motion to compel, even where the result would be the possible inefficient maintenance of separate proceedings in different forums." *Id.,* at ____, 84 L.Ed.2d at 163, 105 S.Ct. at 1241. There is no legal Bases by which state courts may disregard the holding of *Byrd.* Indeed, in *Moses H. Cone Memorial Hospital,* 460 U.S. at 24, 103 S.Ct. at 941, 74 L.Ed.2d at 785, this Court held that the Arbitration Act applies equally to proceedings in state and federal court. As *Byrd* is expressly premised on the provisoins of the Arbitration Act, if Thomas has nonarbitrable claims for wages against appellants, his remaining state claims must be ordered to arbitration.

ARGUMENT

I California Labor Code § 229 Has Been Preempted By The Federal Arbitration Act.

The issues presented by this appeal are fundamental to the effectuation of Congress' intent in enacting the Arbitration Act. That Act is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Co.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983). Labor Code § 229 is precisely the sort of state protectionist legislation which the Arbitration Act was expressly designed to abrogate.

If the decision of the Court of Appeal is allowed to stand, the clear congressional purpose of the Arbitration Act — the upholding of private contracts to arbitrate as a means of facilitating interstate commerce — will be frustrated.

In *Moses H. Cone Memorial Hospital,* this Court held that:

> "Section 2 is the primary substantive provision of the Act. . . . Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.* The effect of the section is to create a body of federal substantive law of arbitrability, applicable to *any arbitration agreement* within the coverage of the Act."

460 U.S. at 24, 103 S.Ct. at 941, 74 L.Ed.2d at 785 [Emphasis added].

This Court reiterated this statement of law in *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). There appellant argued that a provision of the California Franchise Investment Law, California Corporations Code § 31512, prohibited arbitration of disputes between a franchisee and a franchisor. In finding that the dispute was arbitrable, *despite* California's prohibition against arbitration of such disputes, this Court reasoned:

> "If we accepted this analysis [upholding the California Franchise Investment Law], states could wholly eviscerate Congressional intent to place arbitration agreements 'upon the same footing as other contracts' . . . simply by passing statutes such as the Franchise Investment Law. *We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared [Congressional] policy requiring enforcement of arbitration agreements."*

Id. at 17 n.11, 104 S.Ct. at 861 n.11, 79 L.Ed.2d at 16 n.11 [Emphasis added] [citations omitted]. This Court held:

> "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . .* Congress has thus mandated the enforcement of arbitration agreements.
>
> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of . . . a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' *We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitation under state law."*

465 U.S. at 10-11, 104 S.Ct. at 858, 79 L.Ed.2d at 12 (emphasis added).

In the instant case, Thomas entered into a contract evidencing a transaction involving commerce. *Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 523 F.2d 433, 436-37 (6th Cir. 1975); *Dickstein v. duPont,* 443 F.2d 783, 785 (1st Cir. 1971). Aside from Labor Code § 229, he has asserted no grounds for the revocation of the agreement to arbitrate, nor suggested any plausible reason why Labor Code § 229 is distinguishable from the statute at issue in *Southland.* Thus, under the test clearly set forth in *Southland,* he must be required to arbitrate all of his

claims against Perry and Johnston, including his wage claim.

A smiliar conclusion was reached by the United States Court of Appeals for the Seventh Circuit in *Kroog v. Mait,* 712 F.2d 1148 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984). There, plaintiff brought an action under the Wisconsin securities laws for alleged securities violations. Appellants made a petition to compel arbitration of plaintiff's claims, which petition was denied by the District Court on the basis that a Wisconsin state statute prohibiting arbitration of state securities claims was not preempted by the federal Arbitration Act. The Seventh Circuit reversed and stated:

> "Here we face a naked and irreconcilable conflict between a precise federal mandate to arbitrate and a state provision which prevents arbitration. Once that conflict has been described, we need go no further, *for federal preemption in such cases is automatic.*"

Id. at 1154 [Emphasis added].

The United States Court of Appeals for the Ninth Circuit has also recognized the import of the federal Arbitration Act in *Bayma v. Smith Barney, Harris Upham and Co., Inc.,* 784 F.2d 1023 (9th Cir. 1986), where it stated, at 1025:

> "The clear teaching of the Supreme Court is that 9 U.S.C. § 2 (1982) *does not permit state law to carve out exceptions from arbitration merely because the state may prefer to have its citizens present their controversies in the court system. If the contract is one 'involving commerce,' then the question of arbitrability is controlled by federal law and not by state law. See Southland,* 465 U.S. at 16, 104 S.Ct. at 861." [Emphasis added.]

A different conclusion is not mandated either by the fact that Thomas' agreement to arbitrate runs in favor of Kidder, Peabody, or by this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973).

Perry and Johnston are entitled to the benefits of the arbitration agreement embodied in N.Y.S.E. Rule 347. Though Thomas now takes the position that the employees of Kidder, Peabody do not have "standing" to pursue this appeal because they are not signatories to the arbitration agreement, this rather unique argument was raised for the first time on appeal before the Court of Appeal, and was rejected by that Court because it was not raised at the trial court level. *See,* J.A. at 140a.

Further, the law is plainly otherwise. As the Ninth Circuit noted in *Letizia v. Prudential Bache Securities, Inc.,* 802 F.2d 1185 (9th Cir. 1986), under ordinary contract principles, an employee of a corporation is entitled to the benefit of arbitration, as is its principal, where the agreement to arbitrate is entered into for the employee's benefit. That is precisely the situation here, particularly where the Complaint pleads that all the acts of Perry and Johnston were done within the course and scope of their employment with Kidder, Peabody, which would, under principles of respondeat superior, be liable for their conduct. *See also, Ross v. Mathis,* 624 F.Supp. 110 (N.D. Ga., 1985); *Berman v. Dean Witter & Co., Inc.,* 44 Cal.App.3d 999, 1004, 119 Cal.Rptr. 130, 133 (1975).

Ware, likewise, does not mandate a different conclusion. *Ware* involved a claim by a former Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") account executive for certain pension plan benefits of which he was divested when he terminated his employment to join a competitor. Ware brought an action against Merrill

Lynch in the California Superior Court and Merrill Lynch filed a petition for an order directing arbitration, invoking California Code of Civil Procedure § 1281.2. *Id.* at 119-23, 94 S.Ct. at 386-88, 38 L.Ed.2d at 355-57. The trial court denied the petition, relying on Labor Code § 229. *Id.* at 123, 94 S.Ct. at 288, 38 L.Ed.2d 357. As in this case, the Court of Appeal upheld the decision of the trial court, and a petition for hearing by the Supreme Court of California was denied without opinion. *Id.* at 123-25, 94 S.Ct. at 388-89, 38 L.Ed.2d at 357-58.

On appeal to this Court, one of the issues presented was whether Labor Code § 229 was preempted by the '34 Act. *Id.* at 125, 94 S.Ct. at 389, 38 L.Ed.2d at 358. The California Supreme Court noted in its opinion in *Keating v. Superior Court,* 31 Cal.3d 584, 603, 183 Cal.Rptr. 360, 371, 645 P.2d 1192, 1203 (1982), *modified on other grounds,* 465 U.S. 1, 104 S.Ct. 852, 78 L.Ed.2d 1 (1984), that "[t]he [United States Supreme] court in *Ware* did not consider the applicability of the FAA [Federal Arbitration Act], and the holding in that case is consequently not controlling here . . . ." That same determination of the limited holding in *Ware* applies here.

In summary, as this Court made clear in *Southland,* Congress intended the Arbitration Act to preempt *any* state law which might restrict the right to arbitrate. State legislatures are not free to carve out exceptions to that rule, based on their own perception of the appropriate forum for dispute resolution. Instead, Congress has mandated that a contractual agreement entered into between two parties, by which they agreed upon a forum for resolution of their disputes, must be upheld. Thus, Labor Code § 229, to the extent it provides otherwise, has been preempted by the Arbitration Act.

II Labor Code § 229 Has Been Preempted By The '34 Act.

The regulatory scheme of the '34 Act contemplates that the orderly and fair operation of the securities markets, and the broker/dealers operating therein, will be maintained by self-regulatory organizations ("S.R.O.") such as the N.Y.S.E., subject to regulation by the S.E.C. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. at 127-31, 94 S.Ct. at 390-91, 38 L.Ed.2d at 359-61, Merrill Lynch argued that Rule 347 of the N.Y.S.E., providing for mandatory arbitration between a member firm and its registered representative, was part of the regulatory scheme of the '34 Act, and therefore preempted California Labor Code § 229. *Id.* at 134, 94 S.Ct. at 393, 38 L.Ed.2d at 363. However, when *Ware* was decided, the '34 Act gave the S.E.C. authority to review *only* those rules of the N.Y.S.E. promulgated for the protection of the public interest. *Id.* at 135-36, 94 S.Ct. at 393-94, 38 L.Ed.2d at 363-64. The Court held that because Rule 347 was not enacted for the purposes of assuring fair dealing with investors or the general public, and therefore was not subject to review by the S.E.C., it was not enacted as part of the statutory mandate of the '34 Act. *Id.* at 134, 94 S.Ct. at 393-95, 38 L.Ed.2d at 363-65. This Court thus concluded that Labor Code § 229 was not then in conflict with, or preempted by, the '34 Act. This Court, however, suggested that Rule 347 *would* preempt state *law* if it were subject to review by the S.E.C. under the S.E.C.'s statutory grant of authority. *See id.* at 139, 94 S.Ct. at 395, 38 L.Ed.2d at 366.

In 1975, after *Ware* was decided, Congress amended Section 19(c) of the '34 Act, 15 U.S.C. § 78s(c), to provide for S.E.C. review of *all* N.Y.S.E. Rules, including Rule 347. *See* S.Rep.No. 94-75, Ninety-Fourth Congress,

First Session, 27-28, 31 (1975). The 1975 amendments to the 1934 Act were "the most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934," *Herman & MacLean v. Huddleston,* 459 U.S. 375, 384, 385, 103 S.Ct. 683, 688, 689, 74 L.Ed.2d 548, 557 (1983), and granted the S.E.C. its present expansive authority over the N.Y.S.E. *See,* S.Rep. No. 94-75, Ninety-Fourth Congress, First Session, 22-23, 29-32 (1975).

Under current law, each S.R.O., such as the N.Y.S.E., must file with the S.E.C. any proposed changes to its rules, including both its rules that registered representatives arbitrate their disputes with members, and its rules of procedure governing the conduct of those arbitrations. *See,* 15 U.S.C. § 78s(b)(1). Upon the filing of any proposed rule change, the S.E.C. must publish notice of the change and provide interested parties an opportunity to comment. *Id.* Subject to certain exceptions, no proposed rule change may take effect unless approved by the S.E.C. The S.E.C. must grant such aproval if it finds the proposed rules consistent with the requirements of the '34 Act and the regulations thereunder applicable to S.R.O.'s. *See,* 15 U.S.C. § 78s(b)(2). Moreover, the S.E.C. may, on its own initiative, "abrogate, add to, and delete from" any S.R.O. rule if it finds such changes necessary or appropriate for the purposes of the '34 Act. *See,* 15 U.S.C. § 78s(c). In short, the S.E.C. has sweeping authority over the rules adopted by an S.R.O. relating to arbitration of disputes, including disputes between member firms and their employees. Further, the S.E.C. has the power to mandate the adoption of any additional rules it deems necessary to insure the adequacy of an S.R.O.'s arbitration system.

As Judge Friendly observed, in enacting these congressional changes in 1975, Congress:

> "expanded the 'area of supervised self-regulation,' broadening the objectives of self-regulation and prescribing a more active role of the SEC in the oversight of exchange rulemaking .... Under § 19(c) of the [amended] Act, the Commission may abrogate, add to, or delete from the rules of any exchange, as it 'deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purpose of this chapter....' Unlike the prior statute, the amended Act contains no subject matter restrictions on this authority. Rule changes proposed by an exchange must be approved by the Commission as being consistent with the requirements of the Act and the rules and regulations thereunder before the changes can become effective....
>
> [This obviates] the situation that the Court found so troublesome in *Ware* ...."

Drayer v. Krasner, 572 F.2d 348, 357-58 (2d Cir. 1978), *cert. denied,* 436 U.S. 948, 98 S.Ct. 2855, 56 L.Ed.2d 791 (1978). (Citations omitted).

In sum, this Court in *Ware* was of the view that, because the '34 Act did not then provide for S.E.C. review of N.Y.S.E. Rule 347, there was no congressional intent discernible in the '34 Act that state laws in conflict with Rule 347 ought be preempted by federal law. However, since the *Ware* decision was rendered, the '34 Act has been expressly amended to provide for S.E.C. review of Rule 347, a clear expression of Congressional intent to

preempt any state law such as Labor Code § 229 which might interfere with Rule 347. *See also, Amicus Brief of Securities and Exchange Commission in Support of Appellants,* in *Shearson/American Express Inc. and Mary Ann McNulty v. Eugene McMahon, et al.,* Oct. Term 1986, Docket No. 86-44.

III The Policies Of Both The Arbitration Act And The '34 Act Must Prevail Over State Legislative Concerns For The Protection Of Wage Earners.

In *Ware,* this Court opined that Labor Code § 229 was designed to protect the individual, non-union wage earner from the "exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for the redress of an employment grievance." *Ware,* 414 U.S. at 131, 94 S.Ct. at 391-392, 38 L.Ed.2d at 361.

Under the Arbitration Act, it is clear that whatever the purpose of Labor Code § 229, it must fail. This Court expressly held in *Southland* that:

> "In creating a substantive rule applicable in state as well as federal courts, *Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.*"

465 U.S. at 16, 104 S.Ct. at 861, 79 L.Ed.2d at 15. That rule applies despite concerns the state legislatures may have for protecting wage earners.

Moreover, those concerns are illusory. Under the Arbitration Act an arbitration agreement induced by fraud is unenforceable. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). And, under both the state and federal statutory schemes, an arbitration award procured

by corruption, fraud, or undue means, or where the arbitrators were guilty of prejudicial misconduct, may be vacated. *See* 9 U.S.C. § 10; California Code of Civil Procedure § 1286.2.

Further, both the requirement for, and procedures respecting, arbitration between a member firm's employees and its registered representatives have been expressly approved and adopted by the S.E.C., thus indicating that arbitration in the securities industry is both appropriate and fair. Indeed, even under California state law, the arbitration procedures of the N.Y.S.E. have been deemed by the state courts to be ones under which public customers are afforded a "realistic and fair opportunity to prevail." *See Parr v. Superior Court,* 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983). There, the Court of Appeal noted that:

> "[the] arbitration code which would govern in this instance is a relatively new creature. . . . We take judicial notice of the essentially identical NYSE and National Association of Securities Dealers arbitration codes, which would govern the arbitration in this case at petitioner's election. (*Cf.* NYSE Rules, Rules 600 *et seq.*, ¶¶ 2600, *et seq.*) Moreover, we notice the Third Report of the Securities Industry Conference on Arbitration to the Securities Exchange Commission (January 31, 1980). This report indicates that the arbitration code in question was formulated at the instance of the Securities and Exchange Commission (SEC), and that it was approved by the SEC before it was adopted. (SR-NYSE-79-23, SEC Rel. No. 34-16390 (Nov. 30, 1979).)
>
> "The SEC is an agency of the federal government which bears as one of its most important duties the

protection and enforcement of the public's interest in the area of securities.

* * *

"Without some basis for doing so, we are reluctant to find unconscionable procedures which have been approved by the SEC. We find that the procedures outlined in the NYSE rules display beyond any doubt much more than the requisite minimal integrity.

"We note that a person such as petitioner is guaranteed the right to a panel of arbitrators a majority of whom must *not* be from the securities industry; the right peremptorily to challenge one of the arbitrators; the right to a hearing and to present evidence; the right to counsel; and the right to a verbatim record."

139 Cal.App.3d 440 at 446-447, 188 Cal.Rptr. 801 at 805. And, in *Hope v. Dean Witter Reynolds Organization, Inc.*, 181 Cal.App.3d 446, 226 Cal.Rptr. 439 (1986), an opinion certified for publication by the Court of Appeal and affirmed, but decertified, by the California Supreme Court under its state constitutional grant of authority on August 14, 1986, the lower court, relying on *Parr*, expressly found the N.Y.S.E.'s procedures to be such that a registered representative is afforded a "realistic and fair opportunity to prevail in a dispute" with the employer member firm. 181 Cal.App.3d at 459, 226 Cal.Rptr. at 446.

Thus, the desires of the California legislature to protect the wage earner from an "exploitative employer" do not sustain the opinion of the Court of Appeal in this case, for two reasons. First, Congress and this Court have made it clear that such state protectionist goals must give way to a policy which favors the enforcement of *all* agreements to

arbitrate. Second, the wage earner is adequately protected by 9 U.S.C. § 10, California Code of Civil Procedure § 1286.2, and the provisions of the Rules of the N.Y.S.E., which have been expressly approved by the S.E.C. Accordingly, the express policy of both the Arbitration Act and the '34 Act must prevail over the state's concern for the protection of wage earners.

IV The Holding In Byrd Applies Equally To State Courts.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158, does not support the decision of the Court of Appeal. In *Byrd*, this Court held that where arbitrable pendent state claims are factually intertwined with non-arbitrable securities claims:

"... the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."

Id. at ____, 84 L.Ed.2d. at 163, 105 S.Ct. at 1241.

That holding applies equally to state courts. In *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. at 24, 103 S.Ct. at 941, 74 L.Ed.2d at 785, this Court held that the Arbitration Act applies equally to proceedings in state and federal court. Thus, even if appellee has a non-arbitrable claim for wages against appellants, his remaining claims must be ordered to arbitration under *Byrd*. State courts cannot avoid this holding by an *ipse dixit* which says that claims for conspiracy, fraud, and conversion are "essentially" wage claims, because they arise out of the same facts giving rise to the wage claims. Doing so would only undermine

Congress' clear intent that an agreement to arbitrate must be enforced, in either state or federal court, unless Congress itself has clearly indicated that a particular claim not be arbitrated. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ____ U.S. ____, 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444, 456 (1985).

CONCLUSION

Both the Arbitration Act and the '34 Act preempt Labor Code § 229. And, this Court's holding in *Byrd* ought to be extended to state courts. Accordingly, and for the foregoing reasons, the opinion of the Court of Appeal should be reversed.

January 15, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 15, 1987, I served the within Brief of Appellants in re; "Barclay Perry and James Johnston vs. Kenneth Morgan Thomas" in the United States Supreme Court, October Term 1986, No. 86-566;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 15, 1987, at Los Angeles, California

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APPELLEE'S

BRIEF

Supreme Court, U.S.
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No. 86-566

In the Supreme Court of the United States

October Term, 1986

BARCLAY PERRY and JAMES JOHNSTON,

Appellants,

v.

KENNETH MORGAN THOMAS,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISCTRICT, DIVISION FIVE

BRIEF OF APPELLEE ON THE MERITS

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QUESTIONS PRESENTED

1. Did the court of appeal below correctly rule that the U.S. Supreme Court's unanimous, 8-0 ruling in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), is a vital case and is good law, which case held that a wage earner's civil action to collect wages may be pursued without regard to the existence of any private agreement to arbitrate?

2. Did the court of appeal below correctly rule that plaintiff's wage claim was not severable from the tort claims, and thus the tort claims could not be forced to arbitration since they merely constitute different remedies for the same underlying denial of wages?

3. Do these appellants lack standing to seek an order compelling arbitration since

   (a) These appellants were not contracting-parties to the arbitration clause;

   (b) Any standing of appellants to enforce the arbitration clause is derivative through appellants' employer, KIDDER, PEABODY & COMPANY, INC., which is not a party to this proceeding;

   (c) Appellants have failed to join this indispensable party, i.e., KIDDER, PEABODY & COMPANY INC., the corporation through whom they derive their claim of standing to enforce the arbitration clause; and

   (d) KIDDER, PEABODY & COMPANY, INC., who was a contracting-party, filed a separate yet identical action to compel arbitration in the federal district court, which action is not before this Court since it is pending in the United States Court of Appeals for the Ninth Circuit.

4. Was the arbitration clause an unenforceable contract of adhesion?

PARTIES

Parties before the Court of Appeal of the State of California, Second Appellate District, Division Five:

(1) BARCLAY PERRY and JAMES JOHNSTON, appellants herein; and

(2) KENNETH MORGAN THOMAS, appellee herein.

Parties in the underlying civil action before the Superior Court of the State of California:

(1) KIDDER, PEABODY & COMPANY, INC., not a party to this proceeding, but the appellant in parallel proceedings now pending before the United States Court of Appeals for the Ninth Circuit, *Kidder, Peabody & Company, Inc. v. Kenneth Morgan Thomas,* Case No. 85-5935;

(2) BARCLAY PERRY and JAMES JOHNSTON, appellants herein;

(3) KENNETH MORGAN THOMAS, appellee herein.

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No. 86-566

In the Supreme Court of the United States

October Term, 1986

BARCLAY PERRY and JAMES JOHNSTON,

Appellants,

v.

KENNETH MORGAN THOMAS,

Appellee.

BRIEF OF APPELLEE ON THE MERITS

STATEMENT OF THE CASE

Appellee concurs in the Statement of the Case contained in appellants' brief except for two statements made therein. *First,* at page ii thereof, KIDDER, PEABODY & COMPANY, INC., is identified as a party to this proceeding. This is not true. KIDDER, PEABODY itself was not joined in the proceeding before this Court (which arose through the state court system), although KIDDER, PEABODY's attorney did file this appeal on behalf of KIDDER, PEABODY's co-defendants, PERRY and JOHNSTON. KIDDER, PEABODY filed a completely separate, yet identical, action to compel arbitration in the U.S. District Court for the Central District of California. KIDDER, PEABODY's federal

action to compel arbitration is not before this Court. *Second*, at footnote 1 on page 6 thereof, appellants claim that federal jurisdiction for KIDDER, PEABODY's federal action to compel arbitration was based on diversity of citizenship *and* based on the federal Arbitration Act. This also is incorrect. See Joint Appendix ("J.A.") at 146(a). Federal jurisdiction for KIDDER, PEABODY's action was alleged solely on the basis of diversity of citizenship, 28 U.S.C. §1332, and not on the basis of the federal Arbitration Act. The federal Arbitration Act (9 U.S.C. §2) is not federal law which furnishes an independent basis for federal jurisdiction, *Commercial Metals Co. v. Balfour Guthrie & Co., Ltd.*, 577 F.2d 264, 268 (5th Cir. 1978); and no complete diversity of citizenship exists because the plaintiff (appellee herein) is a resident of the same state (California) as defendants BARCLAY PERRY and JAMES JOHNSTON (appellants herein). J.A. 190a-191a. This fact is undisputed.

The pending matter has a significant procedural history which bears on the issue of appellants' standing to compel arbitration and the potential threat of conflicting results from the duplicate state court and federal court actions.

A. The Dual Proceedings in the State Trial Court and the Federal District Court.

There are three defendants who have been named and served in the underlying state court action: (1) KIDDER, PEABODY & COMPANY, INC., (2) BARCLAY PERRY, and (3) JAMES JOHNSTON. J.A. 1a-13a.

On February 13, 1985, all three defendants jointly filed their answer in the *state* court proceeding. J.A. 14a-15a. Said defendants are all represented by the *same* counsel, Overton, Lyman & Prince.

On February 22, 1985, all three defendants jointly filed in the *state* trial court a motion to stay proceedings. Concurrently, a motion to compel arbitration was filed in the *state* trial court by KIDDER, PEABODY's attorneys on behalf of KIDDER, PEABODY's co-defendants, PERRY and JOHNSTON. J.A. 17a-57a. KIDDER, PEABODY did *not* join in said *state* court motion to compel arbitration.

On March 15, 1985, defendant KIDDER, PEABODY filed in the *federal* district court the same identical motions to stay proceedings and compel arbitration (J.A. 149a-159a), which thereby duplicated the motions filed by KIDDER, PEABODY's attorneys in the *state* trial court on behalf of co-defendants, PERRY and JOHNSTON.

On April 10, 1985, the *state* trial court entered an order (1) denying the motion by KIDDER, PEABODY and its co-defendants for an order staying proceedings and (2) denying the motion by KIDDER, PEABODY's co-defendants for an order compelling arbitration. J.A. 108a. The court ruled:

> "*Merrill Lynch, Pierce Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 [1973] is the controlling authority here. *Southland Corp. v. Keating* [465 U.S. 1 (1984)] related to Corporate Code Sect. 31512, part of the California Franchise Investment Law and *Dean Witter v. Byrd*, [470 U.S. 213, 105 S.Ct. 1238 (1985)] concerned federal securities claims by a customer against a securities broker. Neither case involved California's 'strong policy of protecting its wage earners . . . from undesirable economic pressures', as in *Ware*." (J.A. 108a)

On April 23, 1985, the *state* trial court filed its Statement of Decision, declaring:

> "The within action is fundamentally an action to recover commissions allegedly earned as an employee of defendant. Counsel stipulated, and this Court so finds, that 'commissions' as used in this case are 'wages' as used in *Labor Code* Section 229. The ancillary causes of action for conversion, civil conspiracy and breach of fiduciary duty do not change this action into something other than one by an employee seeking different remedies for alleged wrongful withholding of commissions. The alleged claims over and above the commissions sought arise, if at all, from defendants' actions in withholding the commissions and they may properly be asserted along with the basic action for commissions." *Merrill Lynch, Pierce, Fenner & Smith, Inc v. Ware*, 414 U.S. 117, controlling authority here, holds that in accordance with California *Labor Code* §229, actions to collect wages may be pursued without regard to private arbitration agreements. Accordingly, the within Petition to Compel Arbitration and companion Motion to Stay Proceedings in accordance with the private arbitration agreement between plaintiff and defendant are denied." (J.A. 128a-129a)

On April 26, 1985, the *federal* district court entered an order denying KIDDER, PEABODY's motion to compel arbitration and dismissing the federal action to compel arbitration filed by KIDDER, PEABODY. J.A. 235a.

B. The Parallel Appeals to the State and Federal Appellate Court.

On May 31, 1985, KIDDER, PEABODY's attorneys filed a notice of appeal to the Court of Appeal of the State of California, Second Appellate District, Division Five, on behalf of KIDDER, PEABODY's co-defendants, PERRY and JOHNSTON (appellants herein). J.A. 136a.

On May 24, 1985, KIDDER, PEABODY's attorneys filed a notice of appeal to the *federal* court of appeals, the United States Court of Appeals for the Ninth Circuit, on behalf of KIDDER, PEABODY *alone*. J.A. 240a.

On April 10, 1986, the Court of Appeal of the State of California, Second Appellate District, Division Five, issued an opinion affirming the trial court's order denying the motions to stay proceedings and compel arbitration. The court ruled that the U.S. Supreme Court's unanimous ruling in *Ware* was still a vital case and still binding on the court, citing, *inter alia, Arkansas Electric Cooperative v. Arkansas Public Service Commission,* 461 U.S. 375 (1983). The court of appeal stated that it concurred with the trial court's conclusion that appellee THOMAS has brought a suit for the recovery of wages under several theories, and that the wage claims are not severable from the tort claims. J.A. 139a.

A petition for rehearing, filed in the court of appeal by KIDDER, PEABODY's attorneys on behalf of PERRY and JOHNSTON, was denied on May 6, 1986. J.A. 143a.

KIDDER, PEABODY's appeal from the federal district court's dismissal of its federal petition to compel arbitration is still pending before the Ninth Circuit Court of Appeals.

On July 10, 1986, the California Supreme Court denied a petition for review filed by KIDDER, PEABODY's

attorneys on behalf of co-defendants PERRY and JOHNSTON. J.A. 144a.

From the unfavorable decision by the California Supreme Court, an appeal was filed with this Court by KIDDER, PEABODY's attorneys on behalf of co-defendants, PERRY and JOHNSTON. This Court noted probable jurisdiction. KIDDER, PEABODY, whose attorneys are bringing this appeal, and whose arbitration clause is under review, *is not a party to the appeal before this Court.*

SUMMARY OF ARGUMENT

A. Ware Is the Controlling Authority.

The federal Arbitration Act (9 U.S.C. §1, *et seq.*) was enacted in *1947*. It provides that an arbitration agreement is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The state Arbitration Act (California *Code of Civil Procedure* §1281) was enacted in 1961 and makes the same provision.

California *Labor Code* §229 was enacted in 1959 and provides that a civil action for collection of wages may be maintained without regard for the existence of any private agreement to arbitrate.

In *1973*, the case of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), came before this United States Supreme Court. The facts are virtually identical to the present case. Ware was an account executive who had been employed in the California office of a member-corporation of the New York Stock Exchange. He filed a civil action for the wrongful denial of wages. The defendant, Merrill Lynch, sought to compel arbitration in accordance with an arbitration clause in Ware's contract of employment. While both

the federal Arbitration Act (enacted in 1947) and the state Arbitration Act (enacted in 1961) were in full force and effect at the time of *Ware,* Merrill Lynch chose to rely on the state Arbitration Act rather than the federal Act in seeking to compel arbitration.

In a unanimous, 8-0 ruling, this Court in *Ware* upheld the validity of *Labor Code* §229 in the face of the arbitration challenge. The Court ruled that the state's interest in protecting wage earners prevailed over the federal interest in creating uniformity in dispute resolution in the brokerage industry.

The present case is on "all fours" with *Ware* with a sole exception: Merrill Lynch relied on the state Arbitration Act in *Ware,* and appellants PERRY and JOHNSTON are relying on the federal Arbitration Act in the present case. Since the federal Arbitration Act is a matter of substantive law, and since it was enacted in 1947 long before the *Ware* decision, the federal Act was fully available to the Court and the litigants at the time *Ware* was decided in 1973. The Congressional purpose underlying the federal Arbitration Act was in effect at the time of *Ware*, and this Court expressly acknowledged the existence of the federal Act at footnote 15 of the *Ware* opinion. In short, *Ware* is controlling, and the distinctions raised by appellants are without a cognizable significance.

B. The Tort Claims Are Not Severable From the Underlying Wage Claim.

The court of appeal below correctly held that THOMAS' wage claim is not severable from his tort claims, and thus the tort claims are not arbitrable, since they merely constitute different remedies for the same underlying denial of wages.

Appellants claim that the court of appeal's ruling in this regard is inconsistent with *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985). The ruling in *Byrd* concerned "district courts" and "pendent claims", neither of which are applicable to this matter before this Court which has risen through the *state* court system. The *Byrd* ruling would have more meaning in connection with the *federal* action to compel arbitration filed by KIDDER, PEABODY, which is now winding its way through the federal court system and is pending before the Ninth Circuit Court of Appeals.

C. Appellants Lack Standing to Seek an Order Compelling Arbitration and Have Failed to Join the Indispensable Party Through Whom They Derive Their Alleged Standing, i.e., KIDDER, PEABODY.

In a rather bizarre procedural tactic, KIDDER, PEABODY's attorneys filed motions to compel arbitration in both the *state* court system and *federal* court system. The motion in the state court was filed by KIDDER, PEABODY's attorneys on behalf of KIDDER, PEABODY's co-defendants, PERRY and JOHNSTON (appellants herein). The federal action was filed by KIDDER, PEABODY's attorneys on behalf of KIDDER, PEABODY *alone*. The arbitration clause is contained in a contract of employment in which the only contracting parties are appellee THOMAS and KIDDER, PEABODY. Appellants PERRY and JOHNSTON were not parties to the contract of employment which contained the arbitration clause. Appellants PERRY and JOHNSTON did not join in KIDDER, PEABODY's motion to compel arbitration in the federal court, and KIDDER, PEABODY did not join in appellant's motion to compel arbitration in the state court. Since appellants

were not a party to the alleged private agreement to arbitrate, they lack standing to enforce the arbitration clause, and since appellants derive their alleged standing through KIDDER, PEABODY, who is not a party to this proceeding, appellants have failed to join an indispensable party.

D. The Arbitration Clause Was an Unenforceable Contract of Adhesion.

The purported agreement for compulsory arbitration of plaintiff's wage claim constitutes an unenforceable contract of adhesion. First, the selection of arbitrators is made by the New York Stock Exchange, of which KIDDER, PEABODY is a member-organization, and thus the selection is presumptively biased in favor of management. Second, under the arbitration rules of the Exchange, there is no opportunity for meaningful discovery, i.e., there is no provision for the taking of depositions, and each party has unfettered control over which documents it will make available to the opposing party. Thus, a party in THOMAS' position, i.e., an "outsider" to the corporation, would have no meaningful opportunity to prepare his case for trial.

ARGUMENT

I

IN 1973, THE UNITED STATES SUPREME COURT RULED UNANIMOUSLY (8-0) THAT A WAGE EARNER'S CIVIL ACTION TO RECOVER WAGES IS NOT SUBJECT TO COMPULSORY ARBITRATION, NOTWITHSTANDING THE EXISTENCE OF AN ARBITRATION CLAUSE IN A CONTRACT OF EMPLOYMENT.

A. The U.S. Supreme Court's Ruling and *California Labor Code* §229.

In bringing their appeal, appellants are asking the Court to overrule the unanimous, 8-0 decision in 1973 of this United States Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973) (hereinafter "*Ware*"). If ever a case was controlled by the principle of *stare decisis*, it is the instant action. The facts and issues of the *Ware* case arose in a factual setting which is *virtually identical* to the present action:

1. Both Ware and Thomas (appellee herein) had been account executives employed in the California office of a member-corporation of the New York Stock Exchange;

2. Civil actions had been filed for the wrongful denial of wages due and owing to each plaintiff; and

3. In both cases, the defendants asserted that the arbitration clause in an application form, which plaintiffs had been required to sign as a condition of employment in advance of any dispute, effectively barred the aggrieved employee from access to the civil courts for relief.

In *Ware*, the Supreme Court squarely framed the issue in terms of preemption analysis:

> "Specifically, we are concerned with the questions (a) *whether, in the context of the present case, §229 of the California Labor Code, which would preclude compulsory arbitration of wage disputes, is ineffective under the Supremacy Clause . . .*"

Ware, 414 U.S. at 1125 [emphasis added]

Section 229 of the *California Labor Code* provides in pertinent part:

> "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate . . ."

Under Section 200 of the *California Labor Code*, the term "wages" is defined as follows:

> "(a) 'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, *commission* basis, or other method of calculation."

In the Statement of Decision filed on April 23, 1985, the state trial court specifically found, in accordance with the stipulation of counsel, that the "commissions" at issue in this case are "wages" as used in *Labor Code* §229. (J.A. 128a).

Since the underlying lawsuit arises from the wrongful denial of wages (commissions) owed to plaintiff, California *Labor Code* §229 is directly applicable. Under Section 229, the arbitration clause is unenforceable as a matter of legislative decree and public policy,

buttressed by the unanimous ruling of this Court in *Ware, supra*. Under virtually identical circumstances, the validity of *Labor Code* §229 was tested before the Court in *Ware*, and this Court unanimously ruled that *the State's interest in protecting wage earners prevailed over the Federal interest in creating uniformity in dispute resolution in the brokerage industry. See Ware*, 414 U.S. 135-140. The Court has already performed the balancing of the conflicting state and federal interests involved in this appeal.

After careful scrutiny of the competing interests, this Court concluded in *Ware*:

> "*In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting this employment relationship. The policy prevails in the absence of interference with the federal regulatory scheme. We find no such interference . . .*"

Ware, 414 U.S. at 139-40 [emphasis added].

B. The Legislative History.

The unanimous ruling in *Ware* was underpinned by this Court's consideration of the legislative history of the statutes involved. With regard to the legislative history behind *Labor Code* §229, the Supreme Court observed:

> "By the addition of §229 to its Labor Code in 1959 California codified for the wage earner, with the solitary-collective-bargaining agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate . . . *This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of any employment grievance.* The statute's legislative history is sparse, but the exception carved out for collective-bargaining disputes provides the obvious conclusion that it was the individual, nonunion, and otherwise unprotected wage earner who was the intended beneficiary of the State's grace in providing this remedy. This conclusion is fortified by the fact that §200(a) of the Code defines 'wages' broadly to include 'all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, *commission* basis, or other method of calculation.' And the California court itself has noted *'the established policy . . . of protecting and promoting the right,' 'favored' in the law,' of the wage earner 'to all wages lawfully accrued to him.' City of Ukiah v. Fones,* 64 Cal.2d 104, 108, 48 Cal.Rptr. 865, 867, 410 P.2d 369, 371 (1966). It may be, too, that the legislature felt that arbitration was a less than adequate protection against awarding the wage earner something short of what was due compensation."

Ware, 414 U.S. at 130-31 [emphasis added].

It has been but fourteen years since this Court's unanimous ruling was handed down in *Ware*. In the short period of time that has passed since the Court ruled on this subject, the vital concern with protecting

and safeguarding the rights of wage earners against unscrupulous employment practices has markedly grown in stature. See *Cancellier v. Federated Department Stores,* 672 F.2d 1312 (9th Cir. 1982); *Tameny v. Atlantic Richfield Company,* 27 Cal.3d 167, 164 Cal.Rptr. 839 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981). As the California Supreme Court noted in *Tameny*:

> "In the last half century the rights of employees have not only been proclaimed by a mass of legislation touching upon almost every aspect of the employer-employee relationship, but the courts have likewise evolved certain additional protections at common law."

Tameny, 27 Cal.3d at 178.

It was upon a sound and studied basis that this Court reached its decision in *Ware*.

C. *Ware* is the Controlling Authority.

In *Ware*, the Supreme Court unanimously ruled that the state's interest (*Labor Code* §229) in protecting wage earners from *undesirable economic pressure* prevailed over the federal interest in creating uniformity in dispute resolution in the brokerage industry.

The only distinction between *Ware* and the present case is a *procedural* one. In *Ware*, the motion to compel arbitration was brought in the California Superior Court pursuant to the state Arbitration Act (C.C.P. §1281). In the case at bar, the motion was brought in the California Superior Court pursuant to the federal Arbitration Act (9 U.S.C. §1, *et seq.*). *At the time of* Ware, *the federal Arbitration Act* (enacted in 1947) *was in full force and effect.* The legislative intent underlying the Federal Arbitration Act was in effect at the time

of *Ware*. The federal Arbitration Act is a matter of substantive law. Its application, if any, was available in 1973 at the time of *Ware* without regard to whether the motion was procedurally brought under the state Act or the federal Act. In short, defendants have raised a distinction without a difference; and, in view of the implicit re-affirmance of *Ware* in subsequent cases (see *Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 389 (1983)), *Ware* is the controlling authority.

Appellants rely on the cases of *Southland Corp. v. Keating,* 465 U.S. 1 (1984) and *Dean Witter, Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985). Neither of these cases expressly overrule *Ware*, nor implicitly overrule *Ware*, nor even purport to overrule *Ware*.

It may be suggested that *Ware* does not apply because it deals with alleged pre-emption under the Securities Exchange Act rather than the federal Arbitration Act. This is too narrow a view. The *Ware* analysis begins with the statement that "*the broad issue thus presented to us is the extent to which a federal regulatory statute pre-empts state law.*" 414 U.S. at 125 [emphasis added]. IT SHOULD BE NOTED THAT THIS COURT IN *WARE* HAD THE FEDERAL ARBITRATION ACT WELL IN MIND, REFERRING TO IT IN NOTE 15. 414 U.S. at 135.

If there is a stronger policy underlying the federal Arbitration Act, as opposed to the Securities Exchange Act, BARCLAY PERRY and JAMES JOHNSTON have certainly not identified that policy. Indeed, the policies appear to be the same insofar as arbitration agreements are concerned. (Note the Merrill Lynch "policy arguments" rejected by this Court, 414 U.S. at 134-135.)

Appellants' reliance on *Bayma v. Smith, Barney, Harris & Upham,* 784 F.2d 1025 (9th Cir. 1986), is misplaced. That ruling does not concern itself with *Ware* or California *Labor Code* §229.

If appellants are genuinely perplexed as to how the rulings in *Keating* and *Byrd* can be squared with the unanimous, 8-0 ruling in *Ware*, KIDDER, PEABODY and its co-defendants would have raised the arbitration issue in *one proceeding* rather than in dual-yet-identical proceedings which have now required the attention of both *federal* and *state* trial courts, *federal* and *state* appellate courts, and results in KIDDER, PEABODY's conspicuous absence from the proceedings now before this Supreme Court where its own arbitration clause is under review.

Keating and *Ware* are consistent with each other. *Ware* holds that arbitration agreements between securities brokers and registered representatives are subject to *Labor Code* §229, notwithstanding stock exchange rules promulgated pursuant to §6 of the Securities Exchange Act. *Keating*, on the other hand, deals with the California Franchise Investment Law. *Ware* applies to the factual situation in the instant case; *Keating* simply does not.

In *Muh v. Newberger, Loeb & Co., Inc.*, 540 F.2d 970 (9th Cir. 1976), the Ninth Circuit expressly acknowledged the authority of *Ware*. The ruling in *Muh* hinged on a factual determination whether Muh's claim for compensation came within the scope of California *Labor Code* §229, i.e., was Muh seeking recovery of unpaid "wages"? The *Muh* court determined that the compensation sought by the plaintiff in that case was *not* "wages" as defined in §200(a) of the *California Labor Code* and, therefore, *Labor Code* §229 did not apply. (In the case at bar, *Labor Code* §229 directly applies

since plaintiff is seeking relief for the wrongful denial of wages.) The court in *Muh* observed:

> "*The [United States] Supreme Court has held that the California statute* [*Labor Code* §229] *is neither preempted by stock exchange rules requiring arbitration nor by the federal policy favoring self-regulation of the securities industry. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973)."

Muh, 540 F.2d at 973 n. 3 [emphasis added].

Thus *Ware*, upholding the validity of *Labor Code* §229, is the controlling authority.

II

THE WAGE CLAIM UNDER *LABOR CODE* §229 IS NOT SEVERABLE FROM THE TORT CLAIMS, AND THUS THE TORT CLAIMS ARE NOT ARBITRABLE SINCE THEY MERELY CONSTITUTE DIFFERENT REMEDIES FOR THE SAME UNDERLYING DENIAL OF WAGES.

As the court of appeal correctly held, appellee's wage claim is not severable from his tort claims, and the latter are not arbitrable under *Byrd*. J.A at 142a. The court ruled:

> "We agree with the trial court's conclusion that Thomas has brought a suit for the recovery of wages under several theories. The contract cause of action arises out of the oral agreement giving Thomas a right to commissions on certain stock sales. The law imposes obligations apart from agreements between parties to a contract. If, as is alleged, appellants interfered

> with Thomas's receipt of a commission, if they wrongfuily deprived him of wages by their tortious conduct, they will be liable for the damages that flow therefrom. We do not agree with appellants' suggestion that Thomas's wage claim is severable from his tort claims, and that the later are arbitrable under *Dean Witter Reynolds, Inc. v. Byrd,* (1985) 470 U.S. 213, 105 S.Ct. 1238."

THOMAS is simply seeking different remedies for the same underlying event (wrongful denial of wages).

As a further note, the ruling in *Byrd* concerned "district courts" and "pendent claims", neither of which are applicable in this state court action. A duplicate proceeding regarding this issue is now pending before the federal Court of Appeals for the Ninth Circuit, where the issues of "pendent claims" would have some meaning (but would not be applicable for the same reasons set forth herein). While the Court in *Byrd* did not state its rationale for applying its ruling only to district courts and pendent claims, neither the Court nor Congress could have envisioned this situation where co-defendants would be litigating the identical motion to compel arbitration simultaneously in both the state courts and the federal courts.

III

APPELLANTS BARCLAY PERRY AND JAMES JOHNSTON LACK STANDING TO BRING THEIR MOTION TO COMPEL ARBITRATION.

A. The Issue of Standing is Never Waived and May be Raised for the First Time on Appeal.

The court of appeal below stated that it did not consider the issue of whether appellants had standing to enforce the arbitration clause because the issue was not raised in the trial court but was raised for the first time on appeal. (Decision at p. 2, n. 1) Appellee respectfully disagrees.

In *Juidice v. Vail,* 430 U.S. 327, 331-332, 97 S.Ct. 1211, 1215 (1977), the U.S. Supreme Court ruled:

> "Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III [of the United States Constitution] . . ."

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 260-262, 97 S.Ct. 555, 561 (1977), this Court held:

> "At the outset, petitioners challenged the respondents' standing to bring the suit. It is not clear that this challenge was pressed in the Court of Appeals, but since our jurisdiction to decide the issue is implicated, . . . we shall consider it."

The Court is obliged to consider the question of standing on appeal, even if the issue is not raised by

the opposing party. *United States v. Cianfrani,* 573 F.2d 835, 845 (3rd Cir. 1978).

Thus, this Court should consider appellants' standing, or lack thereof, as a prerequisite to judicial review.

B. The Standing Issue Was in Fact Raised by Appellee at the Trial Level.

Appellee did contend at the trial level that appellants PERRY and JOHNSTON were not parties to the arbitration clause (J.A. 78a) and thus had no standing to request a Statement of Decision on the arbitration issue. (J.A. 120a). The standing issue was timely raised.

C. Appellants Barclay Perry and James Johnston Were Not Parties to the Purported Arbitration Agreement.

It is a well-established principle of law that a party cannot be compelled to arbitrate a dispute to which he has not agreed to submit. *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83, 80 S.Ct. 1347 (1960); *Wheeler v. St. Joseph Hospital,* 63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1977).

By the dubious tactic of duplicating the state court proceedings in the federal court system, *KIDDER, PEABODY & COMPANY, INC., is not a party to this appeal.* The purported agreement to arbitrate is between THOMAS and KIDDER, PEABODY & COMPANY, INC., *only*. A careful reading of the arbitration clause and of Rule 347 of the N.Y.S.E. reveals that these appellants lack standing to compel arbitration. The said purported agreement ("Form U-4"), upon which appellants rely, provides that appellee agrees to arbitrate any dispute *that is required to be arbitrated* under the Rules of the Exchange.

Rule 347 of the Exchange requires only the arbitration of disputes *between a registered representative* (THOMAS) *and a member or member organization of the Exchange* (KIDDER, PEABODY). Rule 347 does not require the forced arbitration of disputes between a registered representative and entities *other than* a member or member organization of the Exchange. Appellants BARCLAY PERRY and JAMES JOHNSTON are not, nor do they claim to be, members or member organizations of the Exchange.

In sum, since "Form U-4" requires only the arbitration of disputes which are required to be arbitrated under the rules of the Exchange, and since Rule 347 of the Exchange only requires the arbitration of disputes between a registered representative and a member or member organization of the Exchange, THOMAS' claims against these non-members, PERRY and JOHNSTON, cannot be compelled to arbitration. Appellants simply lack standing to demand such a procedure.

Any interest which appellants might have possessed in enforcing the arbitration clause dissolved when KIDDER, PEABODY chose not to be a party to these proceedings and, instead, filed a duplicate motion to compel arbitration in the federal district court. KIDDER, PEABODY is an indispensable party to this appeal, which appeal should now be dismissed for lack of standing on the part of these appellants.

Appellants have previously cited the cases of *Ross v. Mathis*, 624 F.Supp. 110 (N.D. Ga. 1985), and *Berman v. Dean Witter & Co., Inc.,* 44 Cal.App.3d 999, 1004, 119 Cal.Rptr. 130, 133 (1975), to support their claim of standing to enforce an arbitration clause to which they were not a contracting-party. Appellants' reliance is misplaced. In both *Ross* and *Berman*, the employees

of the defendant-corporations moved to compel arbitration in the *same proceedings* right along with the defendant-corporations (contracting-parties). In the case at bar, these appellants are attempting to enforce an arbitration clause in a separate proceeding filed in the *state* court apart from the action filed by the defendant-corporation, KIDDER, PEABODY in the federal district court. Neither *Ross* nor *Berman* lend support to such a maneuver by non-contracting parties.

IV

THE ARBITRATION CLAUSE AT ISSUE IS AN UNENFORCEABLE CONTRACT OF ADHESION.

The purported "agreement" for compulsory arbitration constitutes an unenforceable contract of adhesion because (a) the selection of arbitrators is made by the New York Stock Exchange and is presumptively biased in favor of management; and (b) the denial of meaningful pre-trial discovery is unduly prejudicial to a wage earner's claim for relief.

A. The Selection of An Arbitrator by the New York Stock Exchange Is Presumptively Biased in Favor of Management.

In *Hope v. Superior Court of Santa Clara County,* 122 Cal.App.3d 147, 175 Cal.Rptr. 851 (1981), *cert. denied* 456 U.S. 910 (1982), the court examined the arbitration issue as it arose in a dispute between certain account executives and their employer, Shearson Hayden, Stone, Inc. The court ruled that the purported agreement to arbitrate was, in legal effect, *a void and unenforceable contract of adhesion.* The court observed:

> "Here, as in [*Graham v.*] *Scissor Tail*, [28 Cal.3d 807, 171 Cal.Rptr. 604 (1981)], the

> contract containing the arbitration provision was adhesive in nature. It consisted of a standard employment application form, prepared by the New York Stock Exchange, and imposed by Shearson upon all applicants for employment. Shearson does not claim that petitioners had any options other than 'to adhere to the contract or reject it.' [Citation]
>
> . . .
>
> ****
>
> "We must also conclude on the basis of the standards set forth in *Scissor Tail* that the arbitration provisions contained in the contract were unconscionable, and therefore unenforceable. . . . [H]ere, as in *Scissor Tail, the arbitral body is so associated with a party to the contract,* i.e., Shearson, as to be presumptively biased in favor of that party.
>
> ****
>
> ". . . That is not to say that members of the board of directors are in fact biased, or that they would necessarily exercise their authority in a consciously biased fashion; it is to say that the structure of governance of the Exchange is such that *there exists a presumptively institutional bias in favor of member firms and members* who constitute the electoral constituency of the board. Petitioners, being outside constituency [citations] have legitimate cause to complain."

Hope, 122 Cal.App.3d 153-154 [emphasis added]. *Cf. Parr v. Superior Court,* 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983); *Bayma, supra.*

The *Hope* court further ruled that this presumption of bias does not disappear simply because the decisional power is delegated, "*[n]or is the presumption dispelled by rules requiring the arbitrators to be persons not engaged in the securities business or giving the non-member one pre-emptory challenge, or granting the director of arbitration authority to disqualify an arbitrator.*" (122 Cal.App.3d at 155) *See Paramount Famous Lasky Corp. v. United States,* 282 U.S. 30, 43, 52 S.Ct. 42 (1930).

A contrary view is espoused in *Drayer v. Krasner*, 572 F.2d 348 (2nd Cir. 1978). The *Drayer* opinion, however, was based, in part, on the court's belief that the trade association of registered representatives would have complained if the arbitration procedures were unfair. Thereafter, the trade association did *in fact* file a complaint challenging these procedures, *Association of Investment Brokers v. Securities and Exchange Commission*, 676 F.2d 857 (D.C. Cir. 1982) (dismissed for lack of standing), thereby undercutting the basis for the *Drayer* opinion.

In the case at bar, appellants have submitted no evidence whatsoever to overcome the presumption of institutional bias, i.e., evidence which could demonstrate that the Rules of the New York Stock Exchange are fair as applied to a wage earner's claim for relief.

B. The Lack of Discovery Available Under the Rules of the New York Stock Exchange Is Inherently Unfair.

In the usual course of dealings among account executives and the brokerage houses for whom they are employed, agreements and understandings are oral and based on *trust*. From this sacred trust arises the high

standard of fiduciary duty which the law imposes on member-corporations of the Stock Exchange and their employees. An aggrieved employee must have access to the instruments of discovery, such as are available in civil courts, in order to contend with potentially-biased witnesses at trial. The Supreme Court has observed that these instruments of discovery, together with pretrial procedures, "*make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.*" *United States v. Proctor & Gamble Co.,* 356 U.S. 677, 682-83 (1958) [emphasis added]. The arbitration procedures of the New York Stock Exchange do not allow or provide for those indispensable tools of discovery.

Under the Rules of the Exchange, the entire provision for discovery is contained in Section 2619, Rule 619(b) (J.A. 47a), which states that the parties are only required to "cooperate *in the voluntary exchange of such documents and information as will serve to expedite the arbitration*". Under these rules, appellants would have unfettered control over which documents to divulge and which documents to withhold. Said rules would allow appellants to withhold those documents which would prolong the arbitration even if it brought out the true facts, and appellants' decision, whether capricious or not, would be insulated from judicial scrutiny. This is not due process. These rules would sorely handicap a wage earner's claim for relief.

In particular, the arbitration rules of the Exchange do not provide for depositions. A party in appellant's position—now an "outsider" to the defendant-corporation—would be denied any meaningful opportunity to prepare for hearing or trial. It takes little imagination to realize that, if in fact a conspiracy existed

among defendants as alleged in the Complaint, appellee would be at a severe disadvantage in contending with adverse and biased witnesses in the absence of the right to take depositions of these witnesses *in advance* of any trial.

Without meaningful discovery, appellee would be relegated to trying his case "in the dark", an apt description applied by this Court to the state of civil litigation prior to the enactment of the federal discovery rules. *Hickman v. Taylor,* 329 U.S. 495, 500 (1947).

The tools of discovery "minimize the chances for and significance of the trick tactic," *Greyhound Corp. v. Superior Court,* 56 Cal.2d 355, 377, 15 Cal.Rptr. 90 (1961), and, "[i]n this way, it was sought to put an end to the 'sporting theory of justice,' by which the result depends on the fortuitous availability of evidence or the skill and strategy of counsel." *Id.* at p. 18-19.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the judgment of the Court of Appeal should be affirmed.
Dated: February 17, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 17, 1987, I served the within *Brief of Appellee on the Merits* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Supreme Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 17, 1987, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

REPLY BRIEF

Supreme Court, U.S.
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No. 86-566

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

BARCLAY PERRY and JAMES JOHNSTON,

Appellants,

VS.

KENNETH MORGAN THOMAS,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District, Division Five.

REPLY BRIEF OF APPELLANTS

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Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District, Division Five.

REPLY BRIEF OF APPELLANTS

I

WARE IS DISTINGUISHABLE.

Appellee has suggested no reason why this Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), does not apply here. Appellee cites no language in either the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*lll* (" '34 Act"), or the United States Arbitration Act, 9 U.S.C. §§ 1-14 ("Arbitration Act"), nor is any public policy articulated. Instead, appellee simply relies on *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, 94 S.Ct. 383, 38

L.Ed.2d 348 (1973), arguing it is the controlling authority in this case. What appellee fails to recognize is that *Ware* stands for a very limited proposition, to wit, that New York Stock Exchange ("NYSE") Rules 345(a)(1) and 347(b), promulgated as self-regulatory measures pursuant to § 6 of the '34 Act, 15 U.S.C. § 78f, as it existed in 1973, did not preempt California Labor Code § 229. As the California Supreme Court recognized in *Keating v. Superior Court,* 31 Cal.3d 584, 603, 183 Cal.Rptr. 360, 371, 645 P.2d 1192, 1203 (1982), *modified on other grounds,* 465 U.S. 1, 104 S.Ct. 852, 78 L.Ed.2d 1 (1984): "[t]he court in *Ware* did not consider the applicability of the [Arbitration Act]...." Likewise, this Court has not considered the preemptive effect of the '34 Act since its amendment in 1975.

Thus, *Ware* is fully distinguishable, and the applicable authority is *Keating.*

II

APPELLEE'S "STANDING" ARGUMENT FAILS.

Appellee contends that this appeal ought be dismissed because appellants lack "standing" to bring the appeal. Appellee further argues that his "standing" argument has not been waived because "standing" may be raised at any time, citing *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 260-262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450, 461-462 (1977) and *Juidice v. Vail,* 430 U.S. 327, 331-332, 97 S.Ct. 1211, 1215, 51 L.Ed.2d 376, 382-383 (1977). These arguments miss the mark.

A. Appellants Have Article III Standing.

The "standing" requirement in *Juidice* and *Village of Arlington Heights* refers to appellant's "standing" under Article III of the Constitution. As this court explained in *Allen v. Wright,* 468 U.S. 737, 104 S.Ct 3315, 82 L.Ed.2d 556 (1984):

> "... the 'case or controversy' requirement [of Art. III of the Constitution] defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.... The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.
>
> * * *
>
> These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.' "

468 U.S. at 751-752, 104 S.Ct. at 3324-3325, 82 L.Ed.2d at 569-570 [citations omitted].

That appellants have Article III standing cannot be disputed. They are involuntary defendants in the underlying lawsuit which was initiated by appellee. They have been directly injured by appellee's refusal to submit this matter to arbitration pursuant to an agreement of which appellants are the intended beneficiaries. Moreover, the Arbitration Act expressly provides that the trial court

must determine whether the parties made an agreement to arbitrate. *See,* 9 U.S.C. § 4; *Interocean Shipping Company v. National Shipping & Trading Corporation,* 462 F.2d 673, 677-678 (2d Cir. 1972). Thus, appellants have suffered direct injury by appellee's unlawful conduct, their injury will clearly be redressed by the requested relief, and the dispute as to whether the parties ought arbitrate is one which is routinely handled by the courts.

B. Appellee Has Waived the Right to Assert the Affirmative Defense That Appellants Were Not Signatories to the Arbitration Agreement.

By arguing that appellants lack standing "because they were not signatories to the arbitration agreement," appellee is in fact asserting what amounts to an affirmative defense. However, as the state Court of Appeal properly found, this defense has been waived by appellee because he never challenged the "making of the arbitration agreement" as required under 9 U.S.C. § 4 at the trial court level.

Even if the purported defense had not been waived, it lacks any substantive merit. Whether a non-signatory to an arbitration agreement is entitled to the benefit of arbitration is a simple matter of contract law. The employee of a corporation is entitled to the benefit of arbitration, as is its principal, (1) when the employee is acting within the course and scope of his employment, thus rendering the employer liable under *respondeat superior* principles; and/or (2) when the arbitration agreement was entered for the employees' benefit. *See, Letizia v. Prudential-Bache Securities, Inc.,* 802 F.2d 1185 (9th Cir. 1986). The fact that appellees have chosen to enforce their right to arbitration in a different forum from that in which their employer chose to assert its arbitration right

is irrelevant. Appellee's statement that the law is otherwise (without citation to any authority) is plainly wrong.

III

APPELLEE FAILS TO DISTINGUISH BYRD.

Appellee argues that *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1984), does not apply because this proceeding arose in state court. The *Byrd* holding applies equally in federal or state court, for as this Court explained in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the Arbitration Act applies equally to proceedings in state and federal court. Appellee has cited no authority for the proposition that *Moses H. Cone* is not the law, nor can he, because of the clear congressional intent that agreements to arbitrate be upheld in either state or federal court, unless Congress itself has clearly indicated that the particular claim ought not be arbitrated.

IV

APPELLEE'S ADHESION CONTRACT ARGUMENT HAS NO PLACE BEFORE THIS COURT.

Appellee relies on *Hope v. Superior Court of Santa Clara County,* 122 Cal.App.3d 147, 175 Cal.Rptr. 851 (First District, Division One) (1981), *cert. denied,* 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982), for the proposition that the contract between the parties constitutes an unenforceable contract of adhesion under state law. *Hope* has its roots in *Graham v. Scissor-Tail, Inc.,* 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981). In *Graham,* the California Supreme Court held that, under state law, a contract of adhesion containing an arbitration

provision is not enforceable if one of two judicially-imposed limitations exists:

> "The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him . . . The second — a principle of equity applicable to all contracts generally — is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in this context, it is unduly oppressive or 'unconscionable'."

Id. at 820, 171 Cal.Rptr. at 612, 623 P.2d at 172-173.

The court in *Hope* concluded that *based on the record before it,* the rules of the NYSE applicable to the arbitration in question failed to rise to the "minimum level of integrity" deemed necessary by the California Supreme Court.

The holding in *Hope* has no applicability here, for two reasons. First, as the California Court of Appeal subsequently recognized, the case turned solely on the record before it. In *Parr v. Superior Court,* 139 Cal.App.3d 440, 188 Cal.Rptr. 801 (1983), the Court of Appeal (First District, Division One) considered the NYSE's Code of Arbitration Procedure, based on a full record, and concluded that, even under state law adhesion contract principles, the rules afford a public customer "a realistic and fair opportunity to prevail." That same conclusion was reached by the California Court of Appeal (First District, Division One) in *Hope v. Dean Witter Reynolds Organization, Inc.*, 181 Cal.App.3d 446, 226 Cal.Rptr. 439 (1986), an opinion certified for publication by the Court of Appeal and affirmed, but de-certified by the California Supreme Court on August 14, 1986 under its state constitutional

grant of authority. The lower court, relying on *Parr*, expressly found the NYSE's procedures to afford a registered representative a realistic and fair opportunity to prevail in a dispute with a member firm. *See*, 181 Cal.App.3d at 459, 226 Cal.Rptr. at 446.

Secondly, *Hope* and its progeny have no application here, where the case is governed by the Arbitration Act. That principle of law has been recognized by *both* the state and federal courts. In *Tonetti v. Steven L. Shirley and Kidder, Peabody & Company, Inc.*, 173 Cal.App.3d 1144, 1148, 219 Cal.Rptr. 616, 618 (1985), the California Court of Appeal held that "California adhesion contract principles are inapplicable to the enforcement of an arbitration clause in a contract governed by the [Arbitration] Act." Likewise, this Court, and the federal courts below have found that state law has no applicability to cases under the Arbitration Act. *See, Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Bayma v. Smith Barney, Harris Upham & Co., Inc.*, 784 F.2d 1023, 1025 (9th Cir. 1986). Considered under federal law, it is clear that the arbitration agreement in question is fully enforceable, and that appellee's adhesion argument must fail. *See, Pelzman v. Paine, Webber, Jackson & Curtis, Inc.*, 1983-1984 Federal Securities Law Reporter (CCH), ¶ 99,408 (D.C. D.C. 1983) (citing numerous cases) and *Drayer v. Krasner*, 572 F.2d 348 (2d Cir. 1978).

CONCLUSION.

Despite appellee's obfuscation of the standing issue, appellants do clearly have standing to pursue this appeal. Further, appellee's reliance on *Ware*, state adhesion contract principles, and his attempt to isolate the state courts from *Byrd* must all be rejected as inconsistent with this Court's opinions in *Moses H. Cone* and *Southland*.

Dated: April 17, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 17, 1987, I served the within Appellants' Reply Brief in re: "Barclay Perry vs. Kenneth Morgan Thomas" in the United States Supreme Court, October Term, 1986 No. 86-566;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Bruce Gelber
Julian B. Fensten
A Professional Corporation
700 South Flower Street
Los Angeles, California 90017

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 17, 1987, at Los Angeles, California

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